IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 24, 2007 Session

STATE OF TENNESSEE v. MARLON DUANE KISER

Direct Appeal from the Criminal Court for Hamilton County
No. 238279 Stephen M. Bevil, Judge

No. E2005-02406-CCA-R3-DD - Filed November 29, 2007

Following a change of venire, a Davidson County jury convicted the appellant, Marlon Duane Kiser, in the Hamilton County Criminal Court of first degree premeditated murder and two counts of first degree felony murder. After a sentencing hearing, the jury found that the State had proved the following aggravating circumstance: The murder was committed against a law enforcement officer engaged in the performance of official duties, and the appellant knew or reasonably should have known that such victim was a law enforcement officer engaged in the performance of official duties. See Tenn. Code Ann. § 39-13-204(i)(9). Upon further finding that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt, the jury sentenced the appellant to death for each conviction. On appeal, the appellant claims that (1) his right to an impartial jury was violated by the trial court's failure to excuse incompetent jurors for cause; (2) the trial court erred by refusing to excuse for cause jurors who would not consider mitigating evidence; (3) the prosecution used peremptory challenges to excuse jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986); (4) the trial court erred by failing to a hold a pretrial hearing on the admissibility of proposed expert scientific testimony; (5) the evidence is insufficient to support the convictions; (6) the trial court erred by permitting testimony regarding statements made by the appellant regarding his alleged hostility toward police and willingness to kill; (7) the trial court erred by limiting the appellant's proof; (8) the trial court erred by excluding evidence of another person's alleged confession to the victim's murder; (9) the jury instructions on "reasonable doubt" were unconstitutional; (10) the appellant's waiver of rights at the sentencing hearing was unconstitutional; (11) the trial court erroneously denied the appellant's requested instruction on residual doubt; (12) the jury was required to unanimously agree to a life sentence in violation of established case law; (13) Tennessee Rule of Criminal Procedure 12.3(b) violates principles of due process and the principles announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and its progeny; (14) the prosecution is vested with unlimited discretion as to whether to seek the death penalty; (15) the death penalty was imposed in a discriminatory manner; (16) the cumulative effect of the errors at trial violated his due process rights; (17) the statutory capital sentencing scheme in this state fails to articulate or apply meaningful standards for proportionality review in violation of his due process rights; and (18) lethal injection constitutes cruel and unusual punishment and is unconstitutional in this state. Upon review of the record and the parties briefs, we conclude that the appellant is not entitled to relief and affirm the judgments of conviction but

remand the case to the trial court in order for the court to enter only one judgment of conviction for first degree murder.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed and the Case is Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Brock Mehler (at trial and on appeal) and Peter D. Heil (on appeal), Nashville, Tennessee, and Karla G. Gothard (at trial), Mary Ann Green (at trial), Howell G. Clements (at trial), and Hugh J. Moore (at trial), Chattanooga, Tennessee, for the appellant, Marlon Duane Kiser.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; William H. Cox, District Attorney General; and Barry A. Steelman, Executive Assistant District Attorney General, for the appellee, State of Tennessee.

I. Factual Background

In the early morning hours of September 6, 2001, Officer Donald Kenneth Bond, Jr., of the Hamilton County Sheriff's Department was shot to death while patrolling the East Brainerd area of Chattanooga. In October 2001, a Hamilton County grand jury indicted the appellant for first degree premeditated murder, first degree felony murder in the perpetration of theft, and first degree felony murder in the perpetration of arson. The trial court granted a change of venire, and a jury was selected in Davidson County, Tennessee. Trial was held in Hamilton County from November 10-19, 2003. At trial, the defense sought to show that the appellant was framed in the murder by his friend and roommate, Mike Chattin.

A. Guilt Phase of Trial

Malcolm Headley testified that he became acquainted with the appellant in 1999 while working as a security guard at Dole Fresh Fruits in Gulf Port, Mississippi. The appellant, a truck driver, was particularly interested in Headley's military background as a sniper in the Marine Corps. At one point, the appellant asked Headley to get the appellant a bulletproof vest. Headley refused but told the appellant where he could purchase one. The appellant also asked if Headley was interested in selling Headley's gun, but Headley declined. Later, Headley decided to buy himself another gun and decided to sell the appellant his old one. Headley identified his old gun, an MAK-90 semiautomatic assault rifle, as the weapon he sold to the appellant in September 1999. Headley noted that since he had sold the rifle to the appellant, someone had painted it with camouflage colors and had installed a muzzle or "flash suppressor," a device that allowed the weapon to be fired faster and with more accuracy. When Headley sold the gun to the appellant, Headley also purchased one case of Wolf 7.62x39 hollow-point bullets for him.

Headley testified that sometime during 2000, the appellant asked Headley to meet him at a truck stop. Earlier, the appellant had told Headley of some trouble he was having with some law enforcement officers. When they met, Headley asked the appellant if he was headed to court. According to Headley, the appellant replied, "Well, yeah, and if I could kill somebody, I will, even if I have to sneak up on them and do it." Observing Headley's reaction, the appellant said he was "just joking." About a month later, Headley was in the hospital recovering from a broken leg, and the appellant visited him. That was the last time they saw each other.

On cross-examination, Headley testified that the appellant told him that the main reason he wanted to purchase a weapon was to keep it for protection at the home he shared with his mother in Hattiesburg, Mississippi. The appellant told Headley that he planned to teach his mother how to use the weapon because he was often away from home due to his trucking job.

Charles Lamar Sims testified that he owned Uncle Charlie's Produce, a small produce stand on East Brainerd Road in Chattanooga that was located across the street from another fruit stand named Nunley's. Sims' fruit stand was burned down in November 2000. Sims stated that although no charges were brought against anyone, he suspected the owners of Nunley's were responsible for the fire based on their past behavior and the competitiveness between the two fruit stands. Sims rebuilt his stand at the same location after the fire, but he later closed the business for health reasons. He described his fruit stand as clean and organized and said Nunley's looked like a "garbage dump" because bad produce was kept on old boards. Several weeks before the victim was killed, Sims told Mike Chattin that he suspected Nunley was responsible for the fire. Sims said that Nunley's fruit stand also burned down sometime after the victim's death but that Nunley attributed the fire to a kerosene lamp and did not suspect arson.

Carl Hankins testified that he had known the appellant for about three years and met him through their mutual friend, Mike Chattin. Hankins was aware that the appellant had been living at Chattin's house. One day, Hankins, the appellant, and Chattin rode together in Chattin's truck to Uncle Charlie's Produce. Hankins and Chattin got out and spoke with Charlie Sims, who told Chattin that he suspected Nunley had burned down his produce stand. Hankins said that when he and Chattin returned to Chattin's truck, Chattin was mad and related Sims' suspicions to the appellant. The appellant told them that "we ort to go up there and kick his produce around a little bit and turn his tables over and maybe drag him up and down the road." Later, after the group returned to Hankins' house, the appellant talked about retaliating against Nunley for the fire at Uncle Charlie's Produce and suggested burning Nunley's fruit stand under an "eye for an eye" theory of justice. Hankins said he believed the appellant was "just talking." Hankins said their conversation took place a couple of weeks before the victim's death. He said that in the five or six times that he was around the appellant, the appellant told him that he "very much disliked the police department." According to Hankins, the appellant also told him that "he would kill a man before he would ever take a beating like he took before." On the evening of September 5, 2001, Hankins; Chattin; Chattin's girlfriend, Carol Bishop; the appellant; and a man named Murphy were all at Chattin's house. Hankins said that everyone was having a good time and that no one was mad about anything. Hankins said that before he left the house that night, the appellant talked with Chattin over the

telephone. The appellant told Hankins that it was time for him to leave and "that there was either things going on or things I didn't need to be a part of, that it would be better off if I just left."

Beverly Mullis testified that she was the appellant's girlfriend in September 2001. At that time, the appellant was living with Mullis in her home three or four days during the week and was staying at Chattin's house on weekends. The appellant owned a Chevrolet Camaro that Mullis had wrecked in August 2001, causing damage to the front end and headlights. For that reason, neither she nor the appellant drove the car at night. The appellant kept his rifle and magazine clip at Mullis' house, storing the rifle between the mattress and box springs of her bed. On September 5, 2001, the appellant received a telephone call from Chattin and told Mullis that Chattin wanted the appellant to come to his house. Mullis said the appellant left her home in the Camaro about 2:00 p.m., taking his rifle and a backpack with him. On further examination, Mullis said the appellant and his family got angry with her after she refused to return the appellant's car when the appellant went to jail. Mullis said she had been convicted of theft twelve years earlier and driving on a revoked license.

Nola Rannigan testified that she lived off East Brainerd Road and was familiar with Nunley's produce stand, which was located in an empty lot next to her home. In the early morning hours of September 6, 2001, Rannigan was up late playing computer games. Sometime after 1:00 a.m., she looked out her kitchen window and noticed a car with its parking lights turned on parked in Nunley's parking lot. The car was still there when Rannigan looked again a little while later. As she was getting ready for bed, Rannigan heard "a big bam and then there were several bams after that and then a couple of pops." Startled, she looked out the dining room window and saw that the car was still parked at Nunley's. Rannigan looked through the shades and also saw a dark truck in Nunley's parking lot. A person looked toward Rannigan's house, straightened up, got into the truck, and slowly drove away with no lights turned on. Rannigan described the driver as a large man, at least six feet tall. Rannigan recalled that it was about 1:15 a.m. when she first left her computer and about 1:35 a.m. when she heard the noises outside. She estimated that the truck drove away about five to seven minutes later. Rannigan said that after these events, she noticed that the car with its lights on was still parked at Nunley's and considered telephoning the police. However, she decided not to call them and went to bed. About an hour later, Rannigan was awakened by sirens and flashing lights and went outside to talk with the police. She learned that the car still parked at Nunley's was the victim's patrol car. Rannigan said there was a distinct difference in the shots she had heard. She identified a sketch she had drawn of the truck and described it as being very similar to a photograph she was shown. On cross-examination, Rannigan testified that after she heard the gunshots, she heard a door slam. The truck pulled out of Nunley's parking lot five to seven minutes later.

Officer Kevin Floyd of the Hamilton County Sheriff's Department testified that in the late night hours of September 5, 2001, he was on patrol in the Ooltewah area. The victim was also on patrol that night and was assigned to the East Brainerd section of town in an area that included Nunley's fruit stand. Officer Floyd said that about 11:30 p.m., he and the victim responded to a burglar alarm call. About 1:00 a.m., Officer Floyd heard the victim respond to a barking dog call on White Road, about one mile from Nunley's. Officer Floyd said the victim reported being back in service sometime after 1:20 a.m., and Officer Floyd did not hear from the victim again. Officer

Floyd said he was dispatched to look for the victim at 2:25 a.m.

Officer Floyd testified that he discovered the victim lying in the middle of Nunley's parking lot at 2:38 a.m. He went to the victim, saw a lot of blood, and called for an ambulance. At 2:39 a.m., Officer Floyd reported to dispatch that the victim was dead. Officer Floyd backed his car away, checked to see if anyone was in the area, and began taping off the crime scene until other officers arrived. He said that inner and outer perimeters were taped off and that no one besides himself, his supervisor, and medical personnel went into the area near the victim. On cross-examination, Officer Floyd testified that he did not notice whether any of the produce or boards at the fruit stand had been knocked down or vandalized.

Sergeant Stan Hardy of the Hamilton County Sheriff's Department testified that he responded to the crime scene at 2:41 a.m and helped Officer Floyd secure the perimeters. Sergeant Hardy drove the same model of patrol car that the victim drove, a 1999 Ford Crown Victoria. Sergeant Hardy noted that the brake pedal for that model car had to be depressed before it could be driven. On cross-examination, Sergeant Hardy testified that when he arrived at the crime scene, the victim's car doors were closed and the headlights were on. He said the crime scene was tightly controlled.

Murphy Cantrelle testified that he lived next door to Mike Chattin for three or four years but later moved to Louisiana. About one month before the victim's death, Cantrelle was considering moving back to Tennessee and stayed at Chattin's house while he looked for employment. During that time, Cantrelle also helped Chattin remodel his home. He said that his wife remained in Louisiana and that her car, a silver Honda Accord, was not in Chattanooga on the day of the murder. On September 5, 2001, Cantrelle was at Chattin's house. He said that he left that night about 10:00 or 11:00 p.m. but that Carol Bishop, the appellant, and Chattin remained at Chattin's home. Cantrelle described the appellant as wearing shorts and a t-shirt that night.

Cantrelle testified that he had met the appellant through Chattin and that he was aware the appellant had "a lawsuit or something against somebody, a cop or something." Cantrelle said he was sleeping at Carol Bishop's house on the night of September 5/6 and was awakened by Chattin and Bishop entering the house about 2:00 or 3:00 a.m. Cantrelle overhead them say "something about [the appellant] had shot a cop or something, and that was it." Cantrelle said that shortly after the victim's death, he moved to Cleveland, Tennessee.

On cross-examination, Cantrelle denied "running off" when approached by a defense investigator for the case. He said he really did not know the appellant at all. Cantrelle agreed that he once had a successful trucking business and still had family, including an ex-wife and two children, in Louisiana. He denied that he had refused to return to Louisiana because an arrest warrant for non-payment of child support had been issued there. Cantrelle said that he was six feet, one inch tall and estimated that Chattin was about five feet, six inches tall. He said that on September 5, he did not remember the appellant's having a telephone conversation and telling him and Carl Hankins that they needed to leave because something was going to happen. He said that he saw the appellant drink a quart of beer that night and that no one at the house appeared mad about

anything or was planning to commit a crime. After hearing Chattin say that the appellant had shot a police officer, Chattin dialed the police's telephone number on his cellular telephone. However, Cantrelle did not know whether Chattin spoke with the police over the phone. Cantrelle heard some sirens in the distance but eventually went back to bed. Cantrelle denied knowing anything about the victim's murder and denied using methamphetamine with Chattin. He said he had never seen a camouflaged rifle at Chattin's house and denied helping Chattin put a muzzle break on the weapon. He acknowledged that he had been charged in Bradley County with property theft of $2,000.

Sergeant Craig Johnson, the Supervisor for the Chattanooga Police Department's Crime Scene Unit, testified that he reported to the crime scene at 4:15 a.m. and began searching for evidence. Sergeant Johnson noted that the victim was found with his shirt open and that the victim's firearm and the front portion of his bulletproof vest were missing. A button found at the scene was consistent with the victim's shirt having been ripped open. He observed injuries to the victim's mouth, hand, arm, and wrist and knee areas and a pool of blood beneath him. Blood was not present on the front of the victim's shirt in the area where his bulletproof vest would have been, but blood was present on the back panel of the vest. Two bullet holes were also in the vest's back panel. Several pieces of the victim's gun belt were scattered around the lot. The victim's activity log indicated that he had returned to patrol after his last call at 1:28 a.m., but it made no reference to a stop at Nunley's. Sergeant Johnson said that the victim carried a .40 caliber weapon and that three .40 caliber shell casings were found at the scene. Sergeant Johnson stated that he was present at the victim's autopsy and performed gunshot residue tests on the victim's hands. At trial, Sergeant Johnson identified bullets recovered from the victim's abdomen, shoulder, and pelvis during the autopsy.

Sergeant Johnson testified that Mike Chattin's house was about one mile from the crime scene. On the afternoon of September 6, crime scene officers discovered the front panel from a bulletproof vest in Chattin's backyard, and serial numbers showed the front panel matched the back panel from the victim's vest. Officers also found sweat clothes, a boot, and a .40 caliber Glock handgun just below the rear deck of Chattin's house. In addition to the shell casings found during the initial investigation, officers found three additional 7.62x39 shell casings at the crime scene on separate dates from September 2001 to June 2002.

On cross-examination, Sergeant Johnson testified that although the victim's death occurred outside the Chattanooga city limits, the Hamilton County Sheriff's Department requested that the Chattanooga Police Department investigate the victim's death. Sergeant Johnson said that when he first observed the victim's patrol car, its headlights were turned on, but the car's blue lights and more powerful spotlights, used to better illuminate a scene, were not on. The front driver and passenger windows were down. Sergeant Johnson said that his crime scene unit spent well into the afternoon of September 6 at the scene and that a black truck that had been parked in the vicinity of the produce stand was towed to the police department for processing. Sergeant Johnson said that in addition to the handgun, boot, vest panel, and clothing found under the deck at Chattin's house, officers collected many other items that they did not catalog. On redirect examination, Sergeant Johnson testified that items found just inside the door to the unfinished basement of Chattin's house included

a backpack, a cellular telephone, a pair of sunglasses, and a white sock.

Chattanooga Police Department Sergeant Mark Haskins, a SWAT team sniper, testified that he and his unit were dispatched to Chattin's house on September 6 and were advised that "a party there . . . had killed a sheriff's deputy." Sergeant Haskins and his team surrounded the house and finished setting up surveillance after daylight. Sergeant Haskins was using a variable scope mounted on his rifle that allowed him to observe things located several hundred yards away. From his vantage point, Sergeant Haskins saw the appellant walk onto the deck at the rear of the house. The appellant was carrying some items in his arms and dropped the items over the balcony. Sergeant Haskins said he had no doubt the person he saw was the appellant. On cross-examination, Sergeant Haskins testified that he was low to the ground and was looking up at the appellant when the appellant dropped the items. Sergeant Haskins could not tell what specific items the appellant dropped, although they were somewhat "flat." Sergeant Haskins and other officers saw the general area where the items fell and later saw the partial vest, clothing, and a boot near a tire.

Officer Johnny Rogers testified that he was a SWAT team sniper observer in September 2001 and went to Chattin's house with the team. He said that sometime after daylight, he saw the appellant walk out onto the balcony carrying something in his arms, go to the deck rail, drop something over the rail, and go back inside the house. After the appellant was taken into custody a short time later, Officer Rogers said he and Sergeant Haskins went to see what the appellant had dropped. Officer Rogers saw a pistol and part of a bulletproof vest inside some tires. He said the weapon appeared to be the same type of Glock handgun that he knew sheriff's deputies carried.

Hamilton County Sheriff's Department Detective Mark King testified that he also observed the appellant at Chattin's house a few hours after the victim's death. Without using any magnification device, Detective King was able to see the appellant throw items over the deck rail. The appellant then "glanced around" and went back inside the house. Ten to twenty minutes later, Detective King saw the appellant come out of Chattin's basement.

Chattanooga Police Department Officer George Forbes, Jr., testified that he was one of the SWAT team members that responded to Chattin's house. He was positioned near a maroon Dodge pickup truck parked on the side of the house and saw the appellant walk onto the deck and throw something over the side. The item "made a thump when it landed." A few minutes later, the basement door opened, and Officer Forbes heard footsteps crunching on the gravel around the truck. Forbes repeatedly ordered the appellant to lie down on the ground. Two other officers "came around and grabbed him and dragged him to the back of the house to place him into custody." Officer Forbes said the appellant was walking in the general direction of a red Camaro parked in front of the pickup truck when he was stopped. The appellant left the basement door open when he exited, and Officer Forbes saw a semiautomatic assault rifle propped up against the side of the door jamb. Officer Forbes heard a commotion and heard the appellant say, "Fu** you. Give me more. Bitch, is that all you got?" as officers took the appellant into custody. On cross-examination, Officer Forbes testified that the appellant cooperated when he ordered the appellant to lie on the ground but that he heard the appellant actively resisting as officers instructed him to put his hands behind his

back. Officer Forbes said the appellant looked different that morning than the appellant's jail booking photograph depicted.

Chattanooga Police Department Officer David Roddy, a SWAT team squad leader, testified that he watched as Officer Kevin Kincer, another squad leader, grabbed the appellant by his wrists and dragged him away from the house to take him into custody. Officer Roddy stated that as he began to handcuff the appellant, the appellant "came up on all fours, looked at me and sprang up on all fours and dove towards my gun." Officer Roddy said he locked the appellant's arms and punched the appellant once behind the ear "just to put him down and not let him have any access to my weapon." Officer Roddy put both knees on the appellant's shoulder, and other officers again tried to handcuff him. The appellant repeatedly said, "Fu** you. Give me more of that. Is that all you got?" while four or five officers struggled to control him. Officer Roddy said he hit the appellant once or twice because the appellant was still trying to obtain Officer Roddy's weapon. Once the appellant was handcuffed, the officers took him away from the scene to obtain medical attention. Officer Roddy said the SWAT team filed a "use-of-force" report regarding the appellant's arrest. He said that it took "every bit" of the force used against the appellant to apprehend him and that the appellant never stopped fighting until he was totally subdued. SWAT team Officers Daniel Anderson and Kevin Kincer testified consistently with the other team members that the appellant attempted to grab Officer Roddy's weapon and that it took several minutes to subdue and handcuff him.

Chattanooga Fire Department Captain Craig Haney testified that he investigated a possible arson at Nunley's fruit stand on the afternoon of September 6, 2001. He noticed a gasoline-type odor that grew stronger near a black Ford pickup truck parked in the area. He observed a "greasy film" across the truck's windshield that ran off the truck's sides and hood.

Chattanooga Police Department Investigator Chad Rowe testified that he collected three tomatoes that were found near the black pickup truck. Efforts to obtain fingerprints from the tomatoes were unsuccessful. Investigator Rowe found three .40 caliber shell casings and eight 7.62 Wolf shell casings at the scene on September 6. He stated that three additional Wolf casings were later recovered from the scene. Investigator Rowe processed the black pickup truck but found no fingerprints or blood on its exterior. His external examination of the Dodge Ram pickup truck parked at Mike Chattin's house revealed a bullet hole in the side and what appeared to be blood.

Tennessee Bureau of Investigation (TBI) Special Agent Forensic Scientist Oakley W. McKinney testified that he processed evidence in this case. No fingerprints were found on the appellant's rifle, the victim's service revolver, or any of the retrieved shell casings. Two fingerprints recovered from the Dodge Ram's driver's door matched the appellant's fingerprints, and fingerprints recovered from the right rear of the truck matched the appellant's right and left palm prints. Agent McKinney was positive the appellant had touched the door to the Dodge truck, but he could not determine from his examinations whether the appellant was ever inside the truck. In addition to the appellant, Agent McKinney compared the print evidence with prints taken from Mike Chattin, Carol Bishop, the victim, Murphy Cantrelle, and James Bice. Agent McKinney said he personally lifted

prints from the exterior and interior of the victim's patrol car. Of those that were identifiable, some belonged to the victim, and none belonged to the appellant.

TBI Firearms Examiner Teri Arney testified that she test-fired the appellant's camouflaged rifle and examined the shell casings recovered from the crime scene. She determined that all eight casings had been fired from the appellant's rifle and that all three .40 caliber cartridges had been fired from the victim's weapon. Three 7.62 caliber bullets recovered from the victim's body were also fired from the appellant's rifle.

Detective Darrell Whitfield of the Chattanooga Police Department testified that he took casts of boot prints found beside the black pickup truck parked at the crime scene. He also found two Glock shell casings a few feet from the victim's shoulder area.

Tim Commers of the Chattanooga Police Department testified that he went to Mike Chattin's house about 1:00 p.m. on September 6, 2001, and collected part of a Kevlar vest, sweat clothes, a pair of boots, and a .40 caliber Glock pistol from below a deck at the rear of the house. He said the left boot, a size thirteen, and the pistol were found inside a tire under the deck. The clothing included black sweat pants, a black t-shirt, and a hooded black sweatshirt. A rifle was found inside the basement along with two magazine clips taped to each other and taped to the rifle. A backpack, a pair of yellow sunglasses, a cellular telephone, and a white sock were found nearby. A spool of fishing line, a canister, and a plastic bag containing three boxes of Wolf 7.62x39 ammunition were in the backpack. A black ski mask, a bandana, a hat, a Crown Royal bag, and mesh camouflaged material were also in the backpack. Commers searched the red Camaro parked at the residence and noticed that it had a broken headlight. Three live rounds of Wolf rifle ammunition were recovered from a toolbox in the car.

Mario Cunningham from the Chattanooga Police Department's Crime Scene Unit testified that he took a gunshot residue sample from Mike Chattin on September 6, 2001, at 11:20 a.m. He stated that gun cleaning solvent, high velocity 30-30 shells, and other types of ammunition, including 42 rounds of .22 caliber shells, were recovered from Chattin's garage.

Royellen LaMarre from the Chattanooga Police Department testified that she took a gunshot residue sample from Carol Bishop on September 6. On cross-examination, she testified that she also collected items from inside Mike Chattin's house. Those items included live rounds of ammunition that were on a table by Chattin's bed; a gun cabinet standing in the middle of the room with live rounds in it; other live rounds; a "gun bible"; and four weapons, including a 12-gauge shotgun, a .380 "long gun," and two rifles. Lamarre said a total of 1,214 live rounds of ammunition were collected from Chattin's home, mostly from Chattin's and the appellant's bedrooms. In the appellant's bedroom, a box of ammunition was under the bed and a white sock in a dresser contained 20 rounds of 7.62x39 ammunition. Over 300 of the live rounds collected from the home came from the appellant's bedroom, and boxes of Wolf ammunition were there but nowhere else in Chattin's house.

Ed Duke testified that in September 2001, he was an investigator for the Chattanooga Police

Department's Crime Scene Unit. He collected a gunshot residue sample from the appellant at 5:15 p.m. on September 6, about 9 hours after the appellant was taken into custody and about 16 hours after the shooting at Nunley's.

James Russell Davis, II, a special agent and forensic scientist with the TBI, testified that he performed microanalysis on gunshot residue tests collected from the victim, Carol Bishop, Mike Chattin, and the appellant. As to the victim, the test results were inconclusive as to whether the victim fired, handled, or was near a gun when it fired. No elements indicative of gunshot residue were present on Bishop's or Chattin's tests. Elements indicative of gunshot residue were present on the appellant's test, which indicated the appellant could have fired, handled, or was near a gun when it was fired. Davis said that gunshot residue is basically held in the oils on a person's hands and that the residue is more likely to wear off over time. Also, the residue will disappear very quickly if a person washes his hands with soap and water. Davis found that particles consistent with gunshot primer residue were present on a sweatshirt and a pair of sweat pants he tested. Davis found no evidence of gunshot residue or particles on the clothing the appellant was wearing when he was arrested. On cross-examination, Davis said that gunshot residue tests cannot show conclusively whether someone fired a weapon or only handled or was near a weapon that had been fired. He said it was possible for a small amount of residue to transfer from one person to another. Davis agreed that it was not absolutely possible to tell from the test results whether any of the subjects he tested had fired a gun or not. He said the test was often used as an investigative tool to determine which suspects investigators should focus on. Davis said that when he found that a test, such as Chattin's, did not have significant levels of all of the components of gunshot residue, he listed it as "absent." However, this did not eliminate the possibility that the person fired, handled, or was near a gun when it was fired. Regarding the appellant's test, Davis said he had never analyzed a test taken so long after a shooting incident.

TBI Special Agent Forensic Scientist Linda Leigh Littlejohn testified that she specialized in shoe print, fiber, and physical comparisons. Her examination of the evidence in this case indicated that partial shoe tracks found near the black truck at the scene of the shooting were consistent in size, shape, and tread design with the left boot recovered from Chattin's house. Agent Littlejohn concluded that the prints could have been made by the boot recovered at Chattin's home or one exactly like it. She observed that the hooded sweat jacket was unusual in that someone had sewn a camouflaged burlap material onto the back. In vacuumings taken from the driver's seat of the victim's patrol car, Agent Littlejohn found fibers consistent with or matching those from the burlap material on the sweat jacket. She concluded that the fibers from the patrol car could have come from the sweat jacket or another identical piece of fabric. Agent Littlejohn noted that the burlap was sewn onto the sweat jacket with fishing line that was consistent with other fishing line found on and inside the backpack she examined. She could not say that the fishing line came from the same roll of line found in the backpack. On cross-examination, Agent Littlejohn testified that the nature of fiber comparisons did not allow her to positively identify the source of a fiber to the exclusion of all others.

Amy Michaud testified that she worked for the FBI Crime Laboratory in the Trace Evidence Unit at Quantico, Virginia and analyzed hair and fiber evidence. From evidence she examined in this case, Michaud concluded that a pubic hair found in debris scraped from the hooded sweat jacket was microscopically similar to a hair sample obtained from the appellant's pubic region and dissimilar to a sample collected from the victim. Two Caucasian head hairs found in debris scraped from a t-shirt "exhibited similar microscopic characteristics with slight differences" to a head hair sample collected from the appellant. The two hairs were dissimilar, however, to samples obtained from the victim, Mike Chattin, and Murphy Cantrelle. Scrapings taken from the sweat pants revealed three pubic hairs that were similar to the appellant's sample. In summary, Michaud said all the hairs she examined showed similarities with the appellant's sample, and she could not exclude the appellant as their source but excluded the other persons. Michaud also performed fiber testing and concluded that fibers from the sweat pants and the t-shirt were similar to those found in the vacuumings taken from the driver's seat of the victim's car.

On cross-examination, Michaud testified that hairs are unlike fingerprints and are not positively identifiable. Thus, she could not say the hair samples definitively belonged to the appellant. She said microscopic hair comparisons narrow the source of a hair to a very small part of the population and that she had never seen two individuals whose hair she had not been able to distinguish. Michaud could not positively identify the source of the burlap fibers found in the victim's patrol car as the burlap material attached to the sweat jacket.

Laura Hodge testified that she worked in the microanalysis section of the TBI Crime Laboratory and performed fire debris and gunshot residue analysis on some of the evidence in this case. She had the ability to detect gasoline-range products on clothing and in soil samples. She said a soil sample collected from underneath the black pickup truck parked at the murder scene revealed the presence of gasoline-range product, which included all brands and grades of automotive gasoline. She said gasoline-range product was also present on the boots, sweat jacket, sweat pants, and t-shirt she examined. On cross-examination, Hodge testified that she could not tell how long the gasoline had been on the items and that she could not determine whether the gasoline found on the clothing was the same brand or grade as that found in the soil sample.

Dr. Qadriyyah Pillow, a TBI forensic scientist and DNA analyst, testified that she extracted DNA from the waistband of the sweat pants and compared the DNA profile with DNA in blood samples collected from the victim, Mike Chattin, Murphy Cantrelle, and the appellant. She said that the DNA from the waistband matched the appellant's DNA profile and excluded the other profiles and that the probability of an unrelated person having the same profile as the appellant exceeded the current world population. Dr. Pillow also compared DNA collected from blood on the maroon Dodge pickup truck with the victim's DNA profile and concluded that they matched. On cross-examination, Dr. Pillow testified that her examination of the exterior and interior of the victim's patrol car did not reveal the presence of any human blood. The victim's blood was present on the Dodge truck's right fender and hood. No blood was detected on the boots, sweat pants, t-shirt or sweat jacket.

Dr. Stanton Kessler, a medical examiner and forensic pathologist, testified that he performed the victim's autopsy on September 6, 2001. He stated that the victim died of multiple severe gunshot wounds. He said that most of the wounds were made with a large caliber weapon and that the wounds were spread over the victim's body from his mouth and neck to his arms, abdomen, thigh, and knee. Nine wounds were gunshot wounds and one was a graze wound. Seven of the gunshot wounds appeared to come from a high-powered weapon, and the other two could have come from a .40 caliber Glock pistol, the victim's weapon. Dr. Kessler concluded that the gunshots were fired upward from a downward direction, consistent with someone being on the ground and shooting up at the victim as he stood. The bullets tore many of the victim's organs, large vessels, and bones and caused extensive internal bleeding. The gunshot wound in the victim's mouth occurred while the victim's mouth was partially open, rupturing the victim's lips, and exited the base of the victim's skull.

Chattanooga Police Department Officer Perry Walden testified that in the early morning hours of September 6, he was driving home from work and saw several police cars with their blue lights on passing him in the area. He followed them to the crime scene and learned of the victim's death. An officer told him the police were looking for a maroon truck. Officer Walden left the scene and went to the Golden Gallon convenience store for coffee about 4:00 a.m. As he entered the store, he heard a car "accelerating, flying into the parking lot." Walden said the driver came inside, asked if he was a police officer, and said, "My buddy just killed a policeman." The man identified himself as Mike Chattin and told Officer Walden that his buddy's name was Marlon Duane Kiser. Chattin further said the appellant was at Chattin's home at 8512 East Brainerd and was driving a maroon Dodge truck. Officer Walden noticed that Chattin was driving a red Corvette. Chattin told Officer Walden that he had tried to contact Sam Collins, whom Walden believed was a county police officer. Chattin told Officer Walden that the appellant was dangerous and that some guns were in Chattin's house, including an "AK-47, a pistol, and a 12-gauge."

Chattanooga Police Department Officer William Curvin testified that he was dispatched to the Golden Gallon and saw Officer Walden talking with Mike Chattin. He described Chattin as "obviously extremely upset, shaking all over, legs, arms, he was trembling, chain smoking cigarettes." Officer Curvin said Chattin told them, "I didn't do it, . . . Duane Kiser killed the deputy." Officer Curvin said that he allowed Chattin to continue talking and that Chattin told them the following: The appellant came to Chattin's house with a police handgun and one-half of a vest and told Chattin that he had just killed a deputy. The appellant described the killing as "a big stress reliever." The appellant had been beaten up by some police previously and "wanted to get even." The appellant asked Chattin if Chattin wanted the appellant to kill anyone else for him because the appellant did not believe he had long to live. Chattin told Officer Curvin the appellant had asked Chattin to take him back to the murder scene and drop him off with his rifle "so he could kill as many policemen at the scene as possible before he was killed." Officer Curvin asked Chattin how the appellant originally got to the scene, and Chattin said he had loaned the appellant his maroon pickup truck earlier the previous day. Chattin told Officer Curvin that he had made an excuse to leave his house and had come to the Golden Gallon in order to get away from the appellant. On cross-examination, Officer Curvin acknowledged that the first thing he heard Chattin say was, "I

didn't do it" and that some people who have just committed a crime are extremely upset and trembling.

James Michael Chattin testified that had lived at his home at 8512 East Brainerd Road for about seventeen years and met the appellant about ten years earlier but had not seen him for a long time until a few months before the murder. According to Chattin, he and the appellant were friends, and the appellant had been renting a room at his house. However, at the time of the murder, the appellant was living with a woman in Soddy Daisy most of the time and was no longer staying at Chattin's house regularly. On the afternoon of September 5, Chattin talked with the appellant by telephone, and he and the appellant hauled gravel to Chattin's father's house. Afterwards, they returned to Chattin's house and hung around with other friends, including Murphy Cantrelle and Carl Hankins. Chattin and Carol Bishop had argued earlier, and Chattin left his home during the evening and brought Bishop back with him. At some point, Hankins left, and Chattin and Bishop took a shower. The appellant had been drinking beer and told Chattin that he had decided to spend the night at Chattin's house. Chattin and Bishop went to bed about 11:30 p.m. The appellant's red Camaro was parked at Chattin's house that night. Although the car's hood had been removed and it had a broken light on one side, the car was still driveable. Chattin said that his own truck was also parked outside and that he had left his keys on a shelf between the dining room and the kitchen. He knew the starter on his truck had a problem, but he did not believe the appellant was aware of this.

Chattin testified that he and Bishop went to sleep and that he was awakened sometime after 2:30 a.m. by Bishop telling him someone was knocking on the door. Chattin heard another knock, and the appellant said he needed to speak with Chattin privately. As Chattin followed the appellant to the appellant's room, the appellant told Chattin that he had borrowed Chattin's truck because the headlights on his own car were out. The lights in the appellant's room were dim, and Chattin saw the appellant's gun, a bulletproof vest, and a pistol on the appellant's bed. Chattin said the appellant told him that he had not wanted to "do it that way." When Chattin asked the appellant to explain, the appellant said he had not wanted to leave shell casings and had wanted a whole bulletproof vest, not half of one. Then the appellant told Chattin he had killed a policeman and said, "Guy, I been wanting to tell you I'm a killer." The appellant told Chattin that killing was a "stress relief" and that he had killed fifteen to seventeen other people, including two or three police officers. As they heard ambulance sirens and police cars nearby, the appellant chuckled and said, "It ain't going to do them no good, they're too late." The appellant told Chattin that he "needed to get rid of that stuff" and asked Chattin if he wanted the police officer's gun. Chattin said no but offered to get rid of the evidence. However, the appellant pushed him away. The appellant described how he had pulled the victim up and had pulled off his vest. Chattin said the appellant "showed me how when he picked him up how his arms and his head done, how his body done, told me how he hit the ground. And he was laughing and grinning. And he told me that it made him feel so good, that he picked him up and done it again." The appellant told Chattin that out of caution, he wiped off the bullets he had used with a white sock.

Chattin testified that he could hear police sirens. The appellant went outside to talk with a neighbor and then told Chattin, "Guy, there's a bunch of them down there and if you're any kind of

friend of mine at all, you'll take me riding around and drop me off down there." Chattin said the appellant wanted to return to the scene and kill more policemen. The appellant told Chattin that he could not get Chattin's truck started at the murder scene, so he got into the victim's police car with its engine still running but could not get it into gear. Eventually, the appellant got Chattin's truck started. The appellant told Chattin that he had brought him a "present" and gave him a couple of small bowls of tomatoes. Chattin put the tomatoes in his refrigerator. After relating the details of the murder to Chattin, the appellant said, "[Charlie Sims has] got to know about this."

Chattin testified that he returned to bed and told Bishop about the murder. They decided to leave by making an excuse that Bishop was taking Chattin to eat breakfast. Chattin told the appellant they would bring back something for him to eat, and the appellant told them to "have a good time." Chattin told Bishop to drive to her home. He gave her his gun, telling her to shoot the appellant if the appellant came to her house. Chattin drove himself to the Golden Gallon and got gas for his car. He stated that he tried to telephone his friend Sam Collins, a police officer. Chattin left the Golden Gallon, drove to Bishop's home to check on her, tried to call Collins one more time, and telephoned 911 from his cellular telephone as he was backing out of Bishop's driveway. He then returned to the Golden Gallon and spoke with the police.

Chattin testified that when he, Hankins, and the appellant had stopped at Charlie Sims' fruit stand a few weeks earlier, the appellant had learned that Sims believed Nunley was responsible for burning down Sims' fruit stand. The appellant had said, "I ought to go up there and act like I'm drunk and fall over that guy's fruit stuff and knock it off." The appellant also "said something to the effect of tying [Nunley] and dragging him behind the truck." Chattin said the appellant never said anything about burning Nunley's fruit stand.

On cross-examination, Chattin testified that he did not give the appellant permission to drive his truck that day and did not tell the police he had given the appellant permission to drive it. He said he tried to telephone Sam Collins before calling 911 because he was scared and believed Collins would tell him what to do. After putting gas in his car at the Golden Gallon, Chattin went inside and paid for it but did not tell the clerk that a police officer had been shot. Chattin said the appellant had moved into his house about June 1, 2001. Chattin explained that he needed help with the rent because his wife had moved out. He said that they were married for twenty years and that her leaving upset him. He said the appellant had told him that a police officer had wanted to "date [Chattin's wife] or something." He acknowledged that his wife had taken out an order of protection against him and that he had bought and used cocaine previously. Regarding the murder, Chattin acknowledged that the appellant said he shot the victim four or five times and told him the victim had "got a shot off." The appellant told Chattin that he had borrowed his truck but never told Chattin that the truck had a bullet hole in it. Chattin said he did not kill the victim and never told anyone that he did. He said the appellant told him that the appellant "went up there to burn the fruit stand." Chattin said the appellant told him that when he saw the victim pull into the fruit stand parking lot, he crouched behind Chattin's truck and saw the victim walk over to Chattin's truck. The appellant came out from behind the truck and shot the victim. Chattin said the appellant did not have blood

all over him when the appellant told him about the murder. Chattin said the appellant claimed that he had tried to burn the fruit stand by pouring something on it but that the stand would not burn.

Chattin testified that he camouflaged the appellant's rifle with camouflage coloring and welded the homemade muzzle break onto it. Chattin denied telling the appellant to bring the gun to Chattin's house on September 5 in exchange for rent that Chattin believed the appellant owed. Chattin said he had several types of ammunition in his home, including some 7.62x39 that he had given the appellant. Regarding his wife, Chattin denied that he was jealous of other people talking with her or that he ever went to the restaurant where she worked in order to watch her. He said the appellant once told him that a policeman was interested in dating his wife. However, he denied that the alleged policeman was the same officer who had served him with the protective order.

Chattin testified that the appellant had showed him some gun and "soldier magazines" previously but that they never discussed hunting. When Chattin and Bishop went to bed on September 5, the appellant told them goodnight and did not appear to be mad or upset. Chattin recalled that the appellant said he stood over the victim and shot him, but Chattin could not remember whether the appellant said he used his own gun or the victim's gun. Chattin acknowledged that he did not try to telephone the police from his home phone because he was afraid the appellant would pick up the extension or hear him talking. Chattin said the appellant was not excited while telling him about the murder but "was very calm, [and] showed great pleasure." Chattin said that the appellant told him the appellant had "twisted his feet" while at the scene that night to avoid leaving footprints.

Carol Bishop, Mike Chattin's girlfriend, testified that she went to Chattin's house on September 5 about 10:00 p.m. The appellant was there, and Murphy Cantrelle and Carl Hankins were getting ready to leave. About 10:30 p.m., Bishop and Chattin went to bed. About 2:30 a.m., the appellant knocked on their bedroom door and said, "Mike I need to talk to you in private." Bishop woke up Chattin, and Chattin left the room in order to speak with the appellant. About thirty minutes later, Chattin returned to the bedroom and told Bishop about the murder. Bishop and Chattin tried to come up with an excuse to leave the house. They decided to tell the appellant they were going to go eat breakfast before Bishop went to work. They left in separate cars, and Bishop drove home while Chattin drove to get gas. Chattin then drove to Bishop's house, tried to call Sam Collins, called 911, and left to go meet the police.

On cross-examination, Bishop testified that she did not remember ever seeing the appellant with a gun at Chattin's house. Bishop had known Chattin for years, and they began dating a couple of months before the murder. She denied telling a former employee that the appellant did not shoot the victim. On redirect examination, Bishop testified that she knew the victim well. She described him as her "guardian angel" who would check on her during her work shift at the convenience store and had once responded when someone tried to rob her.

The State recalled Mike Chattin to testify. He identified size eleven boots he wore on the night of the victim's death. On cross-examination, he denied telling anyone that he was eating a

bowl of cereal when the appellant told him that the appellant had killed the victim. He also denied telling anyone that he jumped out a window in order to escape from his house and telephone the police or that the appellant had blood all over his shirt. The State rested its case-in-chief.

Billy Womack testified for the appellant that he had known Mike Chattin for six or seven years. He said that on the afternoon of September 6, Chattin came to his house. Chattin told Womack that he had been in the shower when the appellant came running through the door and said he had just shot an officer. Womack said Chattin told him that "he grabbed his boots, got in his car and left and called 911 coming down the street that I live on."

Joanne Cox testified that on the weekend before the murder, Mike Chattin came to her house and "was making statements about he wanted to kill somebody or burn something. He was completely different than what he'd ever been." On cross-examination, she said her husband, Danny Cox, was in federal prison on a drug conviction at the time of the appellant's trial. She said her husband sold drugs, but she did not know whether he sold any to Chattin. Cox said that the night she observed Chattin was actually the night before the murder "because it was all on the news the next morning." She said Chattin never told her he had killed a police officer.

Mildred Pamela Treadway testified that at the time of the murder, she lived next door to Mike Chattin and did not like him. She had met the appellant about four times. According to Treadway, in May 2001, Chattin asked her to lie to a "cop" and tell him that Chattin was not at home. The officer left his card from the Hamilton County Sheriff's Department in Chattin's door. Later that night, Chattin came to her house, put some papers and a nine millimeter gun on her table, and said he was "going to kill him a cop." Chattin said he had gone to the Sonic Drive-In to see his wife and saw her talking to an officer there. Regarding the murder, Treadway said she saw the appellant on September 6 after 2:00 a.m. when they both came outside to watch police cars driving up and down East Brainerd. She said the appellant was wearing shorts and a tank top and looked like he had just woken up. At about the same time, Treadway saw Murphy Cantrelle packing something into a silver hatchback car. She said that Bishop and Chattin had left around midnight and returned thirty minutes later. Bishop and Chattin then left again driving separate cars. Treadway said that she could see inside Chattin's house from her house, that she saw the appellant sleeping on the couch that night, and that the appellant never left Chattin's house. At the time of the trial, Treadway had moved back to Georgia, saying she had grown tired of Chattin threatening her. She said Chattin threatened to set her basement on fire, took out her security lights, and called her "a lying bitch." Chattin also told her to keep her mouth shut or he would shut it for her. She said that on the night of the murder, Cantrelle left Chattin's house in the Dodge pickup truck about 1:30 a.m. and was gone for "quite a while." He returned and left again in the car he had loaded with "garbage bags and stuff." On cross-examination, Treadway said the officer that delivered the card to Chattin's door was the victim.

Kimberly Bowman testified that she currently was serving a federal prison sentence for a drug conspiracy conviction. Her common-law husband, Greg Drake, and Mike Chattin were good friends. Bowman said that sometime before the murder, she overheard two conversations between Drake and Chattin. First, Chattin told Drake that his wife was having an affair with someone she

worked with at the Sonic. Chattin said he would hurt the man if he ever saw them together. Later, Chattin told Drake that if Drake "ever got busted with our drugs," he should not tell the police that Chattin had supplied Drake with some guns. Chattin also told Drake that he believed his wife was having an affair with a police officer. After the murder, Chattin told Drake "about his roommate killing a police officer." On cross-examination, Bowman testified that before Chattin and his wife separated, she never heard Chattin's wife say anything about dating a police officer.

Melissa Ann Terrell testified that and she and her ex-boyfriend were friends with Mike Chattin and his wife, Tina. She said her boyfriend came home one night and reported that Mike Chattin was very upset because his wife had left him. Chattin thought she was dating a police officer. Chattin told Terrell he was being harassed by the police department because his wife had taken out a restraining order against him. Despite the restraining order, Chattin kept sending flowers and letters to his wife at the Sonic, which violated the terms of the order. Terrell said that the police went to Chattin's house to talk with him about violating the order and that "he occasionally wouldn't open the door or thought he was being harassed by the police." On cross-examination, Terrell testified that Tina Chattin left Mike Chattin in August 2001. Terrell later learned that Tina Chattin left town a long time before the murder with a man who worked at the Sonic. Terrell acknowledged that the man was not a police officer.

Dimple Walker testified she worked at the Golden Gallon with Carol Bishop. When Bishop came to work on September 6, Walker questioned her about the murder. Walker stated that she asked Bishop if the appellant had killed the victim and that Bishop said no. Walker then asked Bishop if Mike Chattin had killed the victim, and Bishop said, "I can't talk about it, I'm scared for my life."

Danny Cox testified that he was serving time in a federal prison for a drug conviction. Cox had worked with and sold drugs to Mike Chattin, and he described Chattin as his "best customer." Cox said Chattin had been repairing Cox's car around the time of the murder. On September 6, Cox telephoned Chattin's house about 1:30 a.m. to check on his car. Cox said he called two or three times and that the appellant answered the telephone each time and told him Chattin was not there. Cox said that during the week before the murder, Chattin came to his house to buy drugs. Chattin also offered him a large amount of money to go to California and kill Tina Chattin's new husband. Cox said that in 2002, Chattin tried to sell him some weapons. According to Cox, Chattin came to his house the evening before the victim's murder and bought a large quantity of crack cocaine. The next morning, Chattin returned and said the appellant "had held him and his old lady, Tina, hostage and he had to jump out the window to go down to the fruit stand to call the police to let them know that Kiser was in the house, in Chattin's house." Cox said Chattin also told him the appellant had borrowed his truck the night before and had brought back a police vest and a gun for a "souvenir." Cox said Chattin told him that he feared for his life, but Chattin appeared calm when he was telling Cox about the night's events. On cross-examination, Cox acknowledged that Chattin told him the appellant killed a police officer. He stated that he suspected Chattin later turned him in to federal authorities. When asked whether there was such a thing as "payback," Cox said, "That's what I'm

doing." On redirect examination, Cox testified that he was not receiving anything in exchange for his testimony and that he had no reason to lie about Chattin or the appellant.

Gregory David Drake, also a federal prisoner, testified that he met Chattin through a mutual friend and purchased guns from Chattin, including one camouflaged weapon. Drake talked with Chattin after the victim's death, and Chattin told Drake that "his roommate came in bragging about he had shot a police officer, . . . took his vest and gun." In late September or early October 2001, Chattin wanted to buy back the camouflaged gun he had sold to Drake. Drake believed Chattin wanted the gun back because Chattin "was under the assumption that if I got arrested, that the police would find the weapon and he did not want the police to know where the weapon came from." On cross-examination, Drake acknowledged that the camouflaged weapon he purchased from Chattin had nothing to do with the victim's death and that he was in possession of the gun at the time of the murder.

Derrick Williams testified that he was serving a twenty-year sentence in federal prison for selling cocaine. He said that he had sold drugs to Mike Chattin and that Chattin had tried to sell him some weapons. After Chattin's wife left him, Chattin cried a lot and told Williams that "if he could find the guy, he would do something to him." Regarding the murder, Chattin told Williams that the appellant woke Chattin and his girlfriend and that the appellant told Chattin he had killed a police officer. Chattin said he left the house and telephoned the police. Chattin also said the appellant had a gun and a vest in his hand and had blood all over his shirt.

Sara Adair testified that she worked at the Sonic with Tina Chattin in 2001. She said that on two or three occasions, Tina Chattin's husband parked in a next door parking lot and watched his wife work, sometimes for several hours. On cross-examination, Adair testified that this happened about six months before the murder, during the Chattins' divorce. Adair said that Tina Chattin left town with a cook named John Hunt who also worked at the Sonic. To Adair's knowledge, Tina Chattin never dated a police officer. Karen Enders and Betty Colter, Tina Chattin's fellow workers at the Sonic, gave similar testimony to Adair.

Dr. Marilyn Miller testified that she taught forensic science and crime scene investigation at the University of New Haven and that the defense hired her to evaluate the physical evidence in this case. Dr. Miller reviewed all of the crime scene photographs, videotapes, forensic testing results, autopsy reports, and over two hundred items of evidence and visited the crime scene. She did not test any evidence independently. From her examination and evaluation of the investigation, Dr. Miller noted the following areas of concern: (1) first responders to the crime scene were not used efficiently; (2) a mirror on the victim's patrol car was used to hold up barricade tape, which meant someone had handled the mirror; (3) the entire corner area around the scene could have been blocked off, including the road, so that physical evidence could not have been inadvertently moved or tampered with; (4) no specialized equipment or lights were used to search for biological evidence; (5) no metal detectors were used to search the area for shell casings or other evidence; and (6) as many as seventeen people had entered the crime scene during the three hours after the victim's body was discovered.

Dr. Miller testified that she also had concerns about the investigation of Mike Chattin's house where the appellant was taken into custody. She concluded that the house was not sufficiently secured and that there was a lack of evidence processing for the Dodge truck. From her examination of the bullet hole in the truck, Dr. Miller opined that the bullet hole was created from a shot fired from the victim's gun when he was either on the ground or in the process of falling. Dr. Miller concluded that the gunshot residue tests in the case were "meaningless" because interpretation of the highly scientific tests was very difficult. She said that gunshot residue tests can be useful if collected from subjects within up to five hours and the subjects have not been moved or washed their bodies or hands. From the fiber testing results, she concluded that the burlap material attached to the sweat jacket possessed a chemical substance that was not found in the fibers recovered from the victim's patrol car. She said the fibers were similar but did not come from the same source.

Dr. Miller testified that no blood was found on the appellant's rifle or the clothing and shoes recovered from Chattin's deck area. She said she would have expected blood to be in the gun's barrel or on the weapon if the victim had been shot while the appellant's rifle was in the victim's mouth. She concluded that if the shooter picked up the victim, shook him, took off his vest, and repeated this procedure, bloodstains and blood spatters would have been on the shooter's clothing. She further noted that no blood was found inside the Dodge pickup or on the backpack.

On cross-examination, Dr. Miller testified said that if gunshot residue was found on clothing the appellant was wearing when he was arrested, it would indicate he was in the presence of a firearm being discharged. She concluded that boot prints found at the crime scene were consistent with, but did not match, the boots recovered outside Chattin's house.

Tina Marie Hunt testified that she and Mike Chattin were married for seventeen years. She said she left him because of his physical and verbal abuse and his drug abuse. Hunt left Chattin in April 2001 and got a protective order against him a few weeks later because he "had family members and friends coming to my job and just bugging me." Hunt also would see Chattin across the street from the Sonic and saw him drive by. She said she called the police six to eight times to report Chattin's violation of the protective order. She believed the victim responded to one of those calls but was not sure. She knew the appellant from working with him at a grocery store fifteen years earlier. On cross-examination, Hunt testified that she never dated a police officer and that Chattin never accused her of doing so.

Hugo Ruiz, an investigator in the public defender's office, testified about the availability of Wolf 7.62x39 caliber ammunition. He described the ammunition as "readily available" in catalogs and stores in the Chattanooga area.

Attorney Mike Anderson testified that in April 1999, he filed a federal civil lawsuit on the appellant's behalf against three police officers and the City of Chattanooga. He said that the appellant was involved in an incident with police in April 1998 and that a trial was scheduled for September 17, 2001. At the final pretrial conference, the other parties suggested having settlement discussions. Anderson made an appointment with the appellant for September 6, 2001, at 8:30 a.m.

to discuss a settlement and trial preparation in the event there was no settlement. Anderson said the appellant was "very enthusiastic" about the planned meeting. On cross-examination, Anderson was asked to read the appellant's responses to a set of interrogatory questions from the civil case. The questions asked the appellant to describe any losses, physical or mental injuries, or other damages he was claiming. In his July 2001 answer, the appellant described numerous physical injuries and stated that he was forced to move, lost his job, became afraid to be alone, and had "grown to despise the police." The defense rested its case.

In the State's rebuttal case, Detective Robert Starnes testified that he and another detective interviewed Chattin's neighbor, Pam Treadway, on her front porch after the victim's death. He said he observed that there was an upward angle from her house to Chattin's house next door and that she could not have seen into Chattin's living room. Detective Starnes observed that on the day of the murder, there also was some type of covering over Chattin's windows that blocked the view from Treadway's house. Detective Starnes stated that he did not see a couch in Chattin's home.

Officer John Jenkins of the Hamilton County Sheriff's Department testified that about April 26, 2001, he went to Mike Chattin's house to serve an order of protection. Chattin was not home, so Officer Jenkins left his business card with his contact information at the house. Chattin contacted him that afternoon, and they agreed to meet the next morning at which time Officer Jenkins delivered the protective order. Officer Jenkins said Chattin was upset about the trouble he and his wife were having but was not angry.

Chattanooga Police Officer Brad Brown testified that he responded to a call from Tina Chattin at the Sonic on May 19, 2001. Tina Chattin reported that her husband had been driving by the restaurant and had sent flowers to her. Officer Brown went to Chattin's house to speak with him, but no one answered the door. Officer Brown left a card on Chattin's door, noting that the restraining order included no indirect contact with his estranged wife.

Carol Bishop testified that she never told Dimple Walker the appellant did not murder the victim. She also never told Walker that she was afraid of Mike Chattin. This ended the proof in the guilt/innocence phase of the trial. Following deliberations, the jury returned its verdict, convicting the appellant of first degree premeditated murder, first degree felony murder committed during the perpetration of arson, and first degree felony murder committed during the perpetration of theft.

B. Sentencing Phase of Trial

Before sentencing, defense counsel notified the trial court of the appellant's decision not to present any mitigating evidence at the sentencing hearing. Following its examination of the appellant, the trial court ruled that the appellant had knowingly, voluntarily, understandingly, and intelligently waived his right to present mitigating evidence and was competent to do so. In the presence of the jury, the defense stated that it would present no further evidence. The State relied on the evidence presented during its case-in-chief. Victim impact statements were also presented.

Following deliberations, the jury sentenced the appellant to death for each of the appellant's murder convictions. The jury found that the State had proven the only alleged aggravating circumstance, that the murder was committed against a law enforcement officer engaged in the performance of official duties, and the appellant knew or reasonably should have known that such victim was a law enforcement officer engaged in the performance of official duties. See Tenn. Code Ann. § 39-13-204(i)(9). In imposing death sentences, the jury further found that the statutory aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt.

II. Analysis

A. Impartial Jury

The appellant claims that the trial court erred by refusing to excuse two jurors, William Morris and Travis Parsons, for cause because the jurors were incompetent. He asserts that the trial court's error forced him to exhaust his peremptory challenges to remove the jurors, which in turn permitted two other allegedly incompetent jurors, Edward Caldwell and Denise Volz, to serve on the jury, violating his right to a fair and impartial jury. The State responds that the challenged jurors either stated during voir dire that they could be impartial or were rehabilitated and that the trial court did not err by refusing to excuse them.

During jury voir dire, prospective juror Morris acknowledged that on his juror questionnaire, he had answered that he believed the death penalty is an appropriate form of punishment in all murder cases. When the trial court asked him if he could consider life and life without the possibility of parole as possible punishments for a first degree murder conviction, Morris acknowledged that he could also consider imposing those punishments. Upon questioning by the defense, Morris stated that everyone facing a murder charge "should be" facing the death penalty. He said that he had the long-standing belief in the "eye for an eye" theory of justice and that a person who killed someone should be killed in return. At first, Morris stated that he did not think he could impose a life sentence for someone convicted of murder. However, he later stated that he could consider a life sentence if the law provided that a defendant would serve at least fifty-one years before becoming eligible for parole. Morris said that he would be able to consider punishments other than death in this case even if the State proved the appellant's guilt and the existence of an aggravating circumstance and that he did not believe such factors as a defendant's bad childhood or age should be considered during sentencing. However, he stated that he would follow the law and consider all options, including mitigating factors, that the trial court instructed him to consider. Upon questioning by the State, Morris stated that executions ought to be televised but that he had no problem following the law. The defense moved to have Morris removed for cause, but the trial court refused. The defense argued that "he's saying that he could not consider . . . mitigating factors. We make our objection based on that." The trial court overruled the objection.

According to the appellant, prospective juror Parsons "twice reaffirmed" during voir dire his belief that if the appellant were convicted of first degree murder, the appellant should receive the death penalty and that this was the only appropriate punishment. The appellant complains that

Parsons only stated he would follow the law and consider all possible punishments in response to leading questions from the trial court. Explaining why he believed the appellant should receive the death penalty if found guilty of first degree murder, Parsons stated, "I mean, they don't -- they're not anymore deserving of life than someone else; the person that they took." However, he said that a defendant's background of abuse or neglect "would have to be taken in consideration," but probably would not make the death penalty inappropriate. In addition, he said a defendant's mental problems or issues "wouldn't really matter." In the following exchange, Parsons further explained to defense counsel his view on the appropriateness of the death penalty if the appellant were convicted in this case:

> Q: Correct. So, essentially, you're saying that if he were found guilty of that you think that that would be the only appropriate punishment?
>
> A. I do. I feel like that that's laid out by the law as to what the punishment would be --
>
> Q: Uh-huh.
>
> A. -- based on the facts and the evidence that was shown or given.
>
> Q: Uh-huh.
>
> A. So, I do have faith in the justice system, so I think if that's what was the applicable punishment, then yeah, I –
>
> Q: Okay.
>
> A. --feel strongly about that.

Parsons stated that he believed death was the appropriate punishment for first degree murder "[i]f that's what the law shows." Upon questioning by the trial court, Parsons said he did not understand that not every first degree murder case was a death penalty case. He said that in his earlier response, his "understanding wasn't as clear about the law itself" and that he "absolutely" would be willing and able to consider and weigh mitigating factors against an aggravating circumstance and to consider life and life without parole as possible sentences based on the proof. The trial court overruled the appellant's challenge of Parsons for cause, stating that "by his answers [he] seemed to be a very fair juror and willing to listen to all the evidence before making any decision, and . . . weighing all the mitigators as well as the aggravating circumstances in this case."

The appellant complains that the trial court's refusal to excuse Morris and Parsons for cause forced him to use peremptory challenges to excuse the prospective jurors and resulted in his

accepting jurors Edward Caldwell and Denise Volz. He asserts that both Caldwell and Volz were incompetent to serve on the jury because of their close personal ties to law enforcement.

Caldwell testified that his sister was a deputy in Memphis, that a friend was an officer in the Chattanooga Police Department, and that other friends were in law enforcement. He said the fact that this case involved a deputy's death would not affect his ability to serve on the jury or give the appellant a fair trial. He said he had not talked with his friend in Chattanooga about the case, that he could consider all of the available sentences, and that he "would base [his decision about the punishment] on what is presented . . . in the case. Exactly." He also stated that he could weigh the aggravating circumstance with the mitigating circumstances. After questioning by the State, the trial court, and the defense, defense counsel told Caldwell, "I read your questionnaire, and listened to your questions, we think you're a good juror for both the state of Tennessee, Mr. Kiser and this State." The record reflects that Caldwell was moved into the jury box during the peremptory challenge process but after the appellant had already used all of his peremptory challenges. The defense did not request that he be removed for cause.

Volz stated during voir dire that her first cousin was a homicide detective in Ohio. She said they were very close and that he talked to her about his work. Volz initially stated that she "possibly could be prejudiced" because the victim was a police officer. She later said, however, that she would not go into the case automatically assuming the appellant was guilty or that a certain sentence should be imposed because the victim was a police officer. She said that she would "have to hear the rest of the evidence," that she would be "open-minded," and that she would listen to mitigating evidence before making a decision regarding the appellant's punishment. Volz said she never believed in the death penalty until she began following Paul Dennis Reid's case. She stated that she now believed in the death penalty and acknowledged that she had changed her mind about the death penalty because the Reid case involved several victims and involved a lengthy appeals process.

Volz acknowledged that she agreed with the following statement on her questionnaire form: "Someone killing an officer of the law should receive a tougher sentence to send a message to the felons. The police should be protected because they're our protectors." She testified that her answer did not mean she felt the death penalty for killing a police officer should be automatic. She said that she was Catholic and had held a religious belief that opposed the death penalty but that her view changed after the Reid case. Volz said that if she were on trial for the murder of a police officer, "[i]t probably wouldn't make me happy to have someone like [me] sitting on the jury." She said she hoped she would not be prejudiced and "would be open enough to listen to all the evidence." She said her willingness to follow and apply the law would "absolutely" override any feelings she had. The record reflects that Volz was moved into the jury box after the appellant had exercised seven out of his nineteen peremptory challenges. The defense did not use a peremptory challenge to remove Volz and did not request that she be removed for cause.

Both the United States and Tennessee Constitutions guarantee a criminal defendant the right to a trial by an impartial jury. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. To that end, parties in civil and criminal cases are granted "an absolute right to examine prospective jurors" in an effort to determine that they are competent. See Tenn. Code Ann. § 22-3-101. The "proper

standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S. Ct. 2521, 2526 (1980)). "[T]his standard . . . does not require that a juror's biases be proved with 'unmistakable clarity.'" Id. Instead, the trial court must have the "definite impression" that the prospective juror cannot follow the law. State v. Hutchinson, 898 S.W.2d 161, 167 (Tenn.1994) (citing Wainwright, 469 U.S. at 425-26, 105 S. Ct. at 853). Irrespective of whether the trial judge should have excluded the challenged jurors for cause, any possible error is harmless unless the jury who actually heard the case was not fair and impartial. State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993); State v. Thompson, 768 S.W.2d 239, 246 (Tenn. 1989). The failure to correctly excuse a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him. Ross v. Oklahoma, 487 U.S. 81, 89, 108 S. Ct. 2273, 2279 (1988); State v. Jones, 789 S.W.2d 545, 549 (Tenn. 1990).

Turning to the instant case, although Morris initially was skeptical that he could impose a sentence on a convicted murderer that might allow him to "walk the streets" again, he changed his position after being advised that a life sentence under state law meant that the appellant would serve at least fifty-one years before becoming eligible for parole. He stated that he would follow the law and consider all options, including mitigating factors, that the trial court instructed him to consider. Although Parsons initially stated that death was the only proper sentence in a first degree murder case, he later admitted that his view was based on his lack of knowledge about the capital sentencing law and his admittedly mistaken impression that every first degree murder case involved a potential death sentence. Parsons said that he "absolutely" would be willing and able to consider and weigh mitigating factors against an aggravating circumstance and that he could consider life and life without parole as possible sentences based on the proof.

In any event, even if the trial court erred by refusing to remove Morris or Parsons for cause, the error is reversible only if Caldwell or Volz were incompetent to serve on the jury. We note that although the record reflects that the appellant used all of his peremptory challenges, he never requested that Caldwell or Volz be removed from the jury for cause. The appellant argues that the trial court sua sponte should have removed those jurors from the panel. However, as our supreme court has instructed, "A defendant must not only exhaust his peremptory challenges, but he must also challenge or offer to challenge any additional prospective juror in order to complain on appeal that the trial judge's error in refusing to excuse for cause rendered his jury not impartial." State v. Irick, 762 S.W.2d 121, 125 (Tenn. 1988) (citing Wooten v. State, 41 S.W. 813 (Tenn. 1897); State v. Doelman, 620 S.W.2d 96, 100 (Tenn. Crim. App. 1981)). Therefore, any complaint regarding the jurors has been waived. See Tenn. R. App. P. 36(a) (providing that our rules do not require "relief [to] be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error").

The appellant contends that in the event the issue has been waived, the inclusion of jurors Caldwell and Volz on the jury constitutes plain error. Tennessee Rule of Criminal Procedure 52(b)

provides that this court may address "[a]n error which has affected the substantial rights of an accused . . . at any time, even though not raised in the motion for a new trial . . . where necessary to do substantial justice." See also Tenn. R. Evid. 103(d). We may only consider an issue as plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error). Furthermore, the ""plain error" must be of such a great magnitude that it probably changed the outcome of the trial.'" Adkisson, 899 S.W.2d at 642 (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

The appellant contends jurors Caldwell and Volz were automatically incompetent to serve on the jury because of their close relationships with law enforcement officers. However, this court has stated that "the alleged relationship of jurors to people connected with law enforcement . . . does not give rise to an inherently prejudicial situation in and of itself." State v. Taylor, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983). Regarding Caldwell, he stated that his sister was a deputy in Memphis and that he had a friend with the Chattanooga Police Department. He stated that he had not spoken with his friend in Chattanooga about the case and that his sister's being a deputy would not make a difference in this case. Moreover, the defense's statement that Caldwell would be a "good juror" for the appellant demonstrates that the defense wanted Caldwell on the panel. Thus, the appellant made a tactical decision not to challenge Caldwell, and he is not entitled to plain error relief.

Turning to juror Volz, she expressed concern that she might be biased because of her close relationship with her cousin, an out-of-state homicide detective, and her belief that offenses against law enforcement officers demand harsher punishment. However, upon extensive questioning, Volz maintained that she did not believe a death sentence was automatically warranted when a law enforcement officer was the victim. She stated that she would be "open-minded," that the law would override any feelings she had about a given case, and that she would consider mitigating evidence before making a decision as to the appellant's punishment. She said that after hearing the mitigating evidence, she could impose a sentence of death, life, or life without parole. Volz's statements "left leeway for rehabilitation" and show that she had not formed an opinion regarding the appellant's guilt or punishment. See State v. Cooper, 847 S.W.2d 521, 535 (Tenn. Crim. App. 1992). Moreover, Volz admitted a past opposition to the death penalty. Therefore, the defense's failure to use a peremptory challenge to remove her from the jury, despite ample opportunity to do so, also may be attributed to trial strategy, and the appellant again is not entitled to plain error relief.

B. Failure to Excuse Jurors for Cause

In a related issue, the appellant asserts that prospective jurors Morris, Parsons, and Obie Jarmon, Jr., should have been removed for cause because their responses during voir dire indicated an unwillingness to consider mitigating factors at sentencing. Although none of these potential jurors served on the jury, the appellant contends that because he was forced to use his peremptory challenges to remove them, other incompetent jurors, including Caldwell and Volz, were forced upon him. As we have concluded, the record does not support the appellant's claim that jurors Caldwell and Volz were incompetent. Accordingly, the trial court's refusal to excuse Morris, Parsons, and Jarmon for cause cannot lead to a finding of reversible error. Moreover, the record reveals that during voir dire, each of these prospective jurors stated that they could follow the law as instructed and could consider and weigh mitigating factors. The appellant is not entitled to relief on this issue.

C. Batson Challenge

The appellant claims that the State exercised its peremptory challenges in a racially discriminatory manner against minority members of the venire in violation of his equal protection rights. The State responds that the Batson challenge was properly overruled because the prosecutor provided a non-discriminatory reason for striking the jurors in question. We conclude that the trial court properly overruled the appellant's Batson claim.

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), the United States Supreme Court held that the prosecutor's use of peremptory challenges to intentionally exclude jurors of the defendant's race violated his right to equal protection under the Fourteenth Amendment to the U.S. Constitution. In Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364 (1991), the Court eliminated the requirement that the defendant and any wrongfully excluded juror(s) be of the same race. See State v. Ellison, 841 S.W.2d 824, 826 (Tenn. 1992). Thus, under Powers, a defendant can establish a prima facie case of purposeful discrimination by showing that the prosecution excluded members of a cognizable racial group from the venire. Id. To invoke Batson protections, a defendant must establish a prima facie case that a juror is being challenged on the basis of race or gender. See Batson, 476 U.S. at 94, 106 S. Ct. at 1721. Once the defendant has presented a prima facie case of purposeful discrimination, the trial court shall require the State to give a race-neutral reason for the challenge. Id.

In the present case, defense counsel raised a Batson claim after jury selection had concluded but before the jury had been sworn. Defense counsel asserted that the challenge was based on the fact that the State had used nine of its nineteen challenges to remove seven African-Americans, one Hispanic, and one Indian from the jury. The trial court responded that under Batson, the appellant was claiming "that there's a pattern excluding a particular group, in this case African Americans," and stated that the prosecution "would have to show that there are race neutral reasons for excusing those jurors." The court noted for the record that two of the first people placed in the jury box, Robert Kennedy and Freeman Cooper, as well as two others, Edward Caldwell and Michelle Shelton,

were African-Americans, all of whom ended up serving on the jury. The hearing continued as follows:

> [The State]: Well, I can answer the question -- the answer to the question, because it's the same [in] regard to every jury; that the juror was stricken because they were equivocal rather than unequivocal regarding their answers regarding the death penalty. Those would be the issues that we looked at, the issue that was at least paramount when the jury was first selected.
>
> THE COURT: So, are you -- I guess what you're saying in response to her challenge -- and it's up to the Court to decide whether there was, in fact, a race neutral reason for excusing those jurors. . . .
>
> From what I understand you're saying is the -- exercising your peremptory challenges against those jurors, not only those but all your jurors is what I understand you're saying, had [nothing] to do with race but it had to do with their answers and responses to the death penalty question, that they -- you felt like they were equivocal and --
>
> [The State]: And other questions. Primarily that.
>
> THE COURT: Primarily that. Which in this type of case, as much time as we've spent on it, of course, this Court recognizes as a race neutral reason and I'll overrule your motion for the Batson challenge.

In this manner, the Batson objection was raised and resolved without specific consideration of any individual juror or the basis for his or her removal. Our supreme court has emphasized that under Batson, a trial court "must carefully articulate specific reasons for each finding on the record, i.e., whether a prima facie case has been established; whether a neutral explanation has been given; and whether the totality of the circumstances support a finding of purposeful discrimination." State v. Hugueley, 185 S.W.3d 356, 369 (Tenn. 2006) (quoting Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 906 (Tenn. 1996)). In the present case, the trial court did not expressly find that the appellant had made out a prima facie case of racial discrimination, yet it required the prosecutor to provide his reason for striking the minority jurors. We must therefore proceed on the assumption that the trial court found that a prima facie case was established. See, e.g., Huguely, 185 S.W.3d at 371; Woodson, 916 S.W.2d at 905 (Tenn. 1996). The prosecutor stated that his reason for striking all of the jurors at issue was the same in each case, that their answers regarding the death penalty were equivocal. The trial court accepted this reason as race-neutral.

As the Hugueley court observed, "If a race-neutral explanation is provided, the trial court must then determine, from all of the circumstances, whether the defendant has established purposeful discrimination." Id. at 368 (citing Batson, 476 U.S. at 98, 106 S. Ct. at 1712). The "trial court may not simply accept a proffered race-neutral reason at face value but must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual." Id. (citing Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317 (2005)). Again, based on the lack of a finding on this prong of the Batson inquiry and the fact that the challenge was overruled, we must assume that the trial court found that no purposeful discrimination by the State was established.

While the appellant challenged the State's removal of nine minority jurors at trial, he focuses on appeal on six of those jurors: Renee Jackson, Darcel Rivera-Mateo, Lisa Carter, Sanjiv Gokhale, Gary Mitchell, and Carolyn Merritt. The appellant contends that when the responses of these jurors concerning the death penalty are compared to the responses of one non-minority juror, Nancy Dunkerly, who sat on the case, it is evident that the proffered reason for removing them was pretextual.

1. Renee Jackson

Renee Jackson acknowledged stating twice in her juror questionnaire that she did not believe in the death penalty. However, upon questioning by the trial court, she said she could consider a life sentence or life without parole if the jury found the appellant guilty. During questioning by the State, Jackson acknowledged that she also responded on her questionnaire that although she did not believe in the death penalty, she did not know how she would feel if a family member or close friend was murdered. Jackson said that her church taught "thou shall not kill, plain and simple" but acknowledged she would follow the law rather than church doctrine.

2. Darcel Rivera-Mateo

Darcel Rivera-Mateo said that she personally did not believe in the death penalty but that she could consider it during sentencing depending on the law and the evidence. When the prosecutor questioned her about whether she could "actually impose" a death sentence despite her beliefs, Rivera-Mateo said that "maybe I could if I have all the evidence and . . . it just depends on all the proof." She stated that she had a Catholic background but did not follow any church and that she would consider the death penalty if the jury convicted the appellant.

3. Lisa Carter

Lisa Carter stated that she was opposed to the death penalty but could consider it during sentencing. Asked to explain her answer in the questionnaire that she believed the death penalty "is a matter of economics," Carter said she believed that "a lot of the people who end up on death row are people who are . . . in a lot of cases economically disadvantaged or . . . in other ways disadvantaged by society."

4. Sanjiv Gokhale

Sanjiv Gokhale said that he was "morally opposed to the death penalty" but that he "would follow the rule of law and act as I've been instructed to." Asked whether he "can really consider the imposition of the death penalty," Gokhale said, "I can. It's -- I'm conflicted. I cannot tell you exactly how I would go about it, but certainly that -- I would feel that would be my obligation to consider it. It's -- I mean, I've never been in this situation." He acknowledged that in his questionnaire, he stated that he did not believe he had the right to end another person's life.

5. Gary Mitchell

Gary Mitchell acknowledged that in his questionnaire, he stated that a defendant should not receive a harsher punishment because the victim is a police officer. He explained that everyone should have "equal justice." When told that the victim's being a police officer killed during the course of duty could qualify as an aggravating factor warranting the death penalty, Mitchell stated that he could follow the law.

6. Carolyn Merritt

Carolyn Merritt said that her sister's boyfriend had been convicted of murder and was still serving his sentence. She said she did not know if she could sit on the jury and did not think she would like to do so. She said she believed that the death sentence was appropriate for some crimes but not others and that it would depend on the circumstances of the case and the manner in which the person was murdered. When the State asked whether she could be a fair juror, Merritt said "I think so." The State then asked, "Do you have any doubt about that?" She answered, "No. Not about the case."

7. Nancy Dunkerly

Nancy Dunkerly voiced no specific opposition to the death penalty. The State asked if she had any reservations about imposing the death penalty, and she stated, "I think I can, far as I know." She again answered only "I think I can" when asked whether she could impose the death penalty in an appropriate case.

Upon our detailed examination of the record, each of the stricken jurors offered responses during voir dire that reflected some equivocation or hesitancy regarding the death penalty. We have compared juror Dunkerly's responses to those set forth above. In our view, the fact that Dunkerly was not stricken does not by itself establish purposeful discrimination. We are unable to determine from the record before us whether the State could have stricken this juror had they wished to do so. The record reflects that the State had one challenge remaining when one other juror was stricken and Dunkerly was then selected as the last person seated in the jury pool. We conclude that the totality of the circumstances do not support a finding of purposeful discrimination in this case and, therefore, that the trial court properly overruled the appellant's Batson challenge.

D. Pretrial Hearing on Expert Opinion Testimony

The appellant argues that the trial court erred by denying his motion requesting a pretrial hearing to determine the admissibility of the State's proposed scientific expert testimony. The appellant concludes that all of the expert testimony was admitted in violation of the Tennessee Rules of Evidence and the procedures outlined in McDaniel v. CSX Transportation, 955 S.W.2d 257 (Tenn. 1997), because the reliability and trustworthiness of the underlying scientific evidence was not determined. The State responds that the appellant has waived any objection to the introduction of the expert testimony because he failed to object to its introduction at trial. The State further contends that through his cross-examination of the State's expert witnesses, the appellant essentially challenged the weight of the expert testimony rather than its admissibility. For this reason, the State concludes that a pretrial McDaniel hearing would not have changed the outcome of the trial. We conclude that the appellant is not entitled to relief.

The record reflects that the appellant initially sought a hearing regarding proposed expert testimony in the areas of gunshot residue, footprint comparison, and microscopic fiber comparison. At a June 6, 2003 motions hearing, the defense expanded its request to include expert testimony regarding DNA, ballistics tests, fingerprint analysis, blood spatter analysis, bullet trajectory analysis, and crime reconstruction analysis. Defense counsel explained that it was seeking a pretrial hearing on "any and all expert testimony the State would intend to present." Defense counsel asserted that although general acceptance and a history of admissibility of certain types of scientific evidence were among the relevant factors for a court to consider, they did not end the inquiry. Counsel reasoned that under McDaniel, "if there's an expert that's going to give an opinion based on, quote/unquote, scientific evidence, or novel evidence, then there has to be a determination that it is relevant, that it's reliable, and the Court needs to conduct this kind of hearing to make sure that it's certainly admissible." Counsel argued that although expert testimony on these different types of scientific evidence had been introduced in other cases, the trustworthiness and reliability of the evidence had not been challenged in those cases. The defense concluded by stating that "we're asking that we have a hearing date set at another time. And we had specifically said we would not ask for specific hearings on each individual issue today."

The trial court expressed reluctance to have the requested hearing, stating as follows:

> So without some showing, some perfunctory showing to say that there is some reason to question the scientific validity or reliability of these tests, I think it's a little broad. To say, Well, we want the fingerprint test, we want [the] ballistics test, we want the microbiologic test, we want the serology test, we want every one of these tests now to be criticized, without some threshold showing of unreliability, I think is -- I'm just not ready to do that, I don't think that's necessary.

> The ones that there is a threshold or some reason to subject that test, or a test that hasn't been accepted, and these are, they've been accepted over and over and over again, and I know that in and of itself doesn't mean that it is valid and it can't be contested, but just to say we want every one of these tests, we feel like every one of these tests now, all of a sudden, now should be subjected and we want that done, I think that's a little broad.
>
> I'll be glad to put this over and give both [parties] an opportunity to present any other authority or any other bases for subjecting those tests to the Daubert standard, I'll be glad to entertain that and give the State time to respond to that.

The trial court stated that it would announce on August 13 whether it would hold a "Daubert hearing." According to an August 13, 2003 minute-entry, the trial court overruled the appellant's motion for a hearing.

The record reflects that each of the State's expert witnesses testified at trial without objection. We briefly set forth the testimony of these witnesses:

James Russell Davis, II, testified that he had been employed as a special agent forensic scientist in the microanalysis section of the TBI laboratory for twenty-two years. He stated that he had analyzed gunshot residue tests for seven years. He detailed his education, training, and experience and stated that he had testified as an expert over one hundred fifty times in various courts. After explaining what gunshot residue is and how it is collected and analyzed, Davis testified about the test results taken from the appellant, the victim, and others in this case. He said that the victim's test was "inconclusive," that Carol Bishop's and Mike Chattin's tests were "negative," and that the appellant's test was "positive" for the presence of elements indicative of gunshot residue. As to the appellant, Davis explained that the result indicated the appellant "could have fired, handled, or was near a gun when it was fired," while the others' results could not "eliminate the possibility that the individual could have fired, handled, or was near a gun when it was fired." Davis said gunshot residue tests cannot determine whether a person actually fired a gun, but were often used as an investigative tool for determining whether a particular person should be further investigated.

Oakely W. McKinney testified that he was a special agent forensic scientist with the TBI. He stated that he had thirty-four years of experience working with latent fingerprints, had conducted "possibly millions" of fingerprint comparisons, and had testified as an expert hundreds of times. McKinney explained that latent fingerprints referred to prints that are recorded or left behind accidentally. He explained that certain conditions are required to leave a latent print and that they are fragile by nature. McKinney said fingerprints recovered from the driver's door and rear panel of a Dodge pickup truck belonged to the appellant.

Teri Arney, a forensic scientist with the TBI, testified that she worked in firearms identification to identify the weapons from which bullets and cartridge cases were fired. Arney testified about her education and training and noted that she had testified about forty times as an expert. She said she test-fired the appellant's rifle and examined eight shell casings recovered from the crime scene and concluded that all eight cases had been fired from the appellant's rifle. Three 7.62 caliber bullets recovered from the victim's body were also fired from the appellant's rifle. Arney further determined that all three .40 caliber cartridge casings recovered at the scene had been fired from the victim's weapon.

Linda Littlejohn, another forensic scientist with the TBI, testified that she worked in the microanalysis section of the TBI laboratory. She said she specialized in shoe print, fiber, and physical comparisons and described her education, training, and experience. Littlejohn said that she had testified about seventy-five times as an expert witness. After explaining how shoe print and fiber comparisons are made, Littlejohn said that a left boot found beneath Mike Chattin's deck matched a partial boot print found at the crime scene. Littlejohn said she also compared fibers and concluded that fibers in vacuumings of the victim's driver's seat were consistent with fibers found on a sweat jacket.

Amy Michaud testified that she was employed as a hair and fiber analyst in the Trace Evidence Unit at the FBI in Virginia. She said she performed hair analysis and found that a pubic hair found on the sweat jacket she examined was "microscopically similar" to the sample provide by the appellant and that two head hairs taken from a t-shirt were microscopically similar "with slight differences" to the appellant's head hair samples. She explained that microscopic hair analysis can be used to narrow the source of a hair to a small part of the population. With respect to fibers, Michaud explained that it was not "positively identifiable evidence" because of the fact that fibers are mass-produced. She said her analysis showed that fibers recovered from the victim's patrol car were microscopically similar to fibers taken from the t-shirt and sweat pants.

Laura Hodge testified that she worked at the TBI in the Microanalysis Section of the crime laboratory. In her work, she performed fire debris analysis and could detect the presence of "gasoline-range products," including all automobile fuels on clothing and in soil samples. She said her testing revealed the presence of gasoline-range product on a soil sample taken from under the black pickup truck found parked at the crime scene as well as on the boots, sweat jacket, t-shirt, and pants recovered from beneath the balcony of Mike Chattin's home.

Any evidence offered by an expert witness must satisfy the general test of relevancy; that is, it must tend to prove an issue that is material to the determination of the case. See Tenn. R. Evid. 401, 402. The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. Rule 702 provides that "[a] witness who is qualified as an expert in a particular field may testify in the form of an opinion if the scientific, technical or other specialized knowledge of the witness will substantially assist the trier of fact in understanding evidence or determining a fact at issue." Tenn. R. Evid. 702; see McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997). Rule 703 provides that expert testimony shall be disallowed "if the underlying facts or data indicate

lack of trustworthiness." Tenn. R. Evid. 703. Taken together, these rules require a trial court to determine "whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness." McDaniel, 955 S.W.2d at 265.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589,113 S. Ct. 2786, 2795 (1993), the United States Supreme court held that Federal Rule of Evidence 702 requires that a trial court "ensure that any and all scientific testimony . . . is not only relevant, but reliable." In McDaniel, our supreme court set forth the following list of non-exclusive factors that may be useful to a trial court in determining the reliability of scientific evidence:

> A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by Frye, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Id. (emphasis added).

As explained in Kumho Tire Co. v. Carmichael, 526 U.S. 127, 152-53, 119 S. Ct. 1167, 1176 (1999),

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert's relevant testimony is reliable. Our opinion in [GE v.] Joiner[, 522 U.S. 136, 118 S. Ct. 512 (1997),] makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "reviews a trial court's decision to admit or exclude expert testimony." 522 U.S. at 138-139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "just determination" of proceedings. Fed. Rule Evid. 102. Thus, whether Daubert's specific factors are, or are not, reasonable measures of reliability in

> a particular case is a matter that the law grants the trial judge broad latitude to determine.

It is well-settled that "the allowance of expert testimony, the qualifications of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court." State v. Rhoden, 739 S.W.2d 6, 13 (Tenn. Crim. App. 1987) (citing Murray v. State, 214 Tenn. 51, 377 S.W.2d 918, 920 (1964); Bryant v. State, 539 S.W.2d 816, 819 (Tenn. Crim. App. 1976); State v. Holcomb, 643 S.W.2d 336, 341 (Tenn. Crim. App. 1982)). This court will not disturb the trial court's ruling absent a clear showing that the trial court abused its discretion in admitting or disallowing expert testimony. Id.; State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002). This court will not find an abuse of discretion unless it "'appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" Stevens, 78 S.W.3d at 832 (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

The trial court's August 13 minutes do not explain why the court denied the appellant's motion requesting a hearing. However, in its June 6 decision to postpone a ruling on the appellant's motion, the court noted that the State's scientific evidence in areas such as blood spatter analysis, fingerprint comparison, and hair and fiber analysis, had been repeatedly admitted in other cases in this state and asked the defense, "[I]sn't that implicitly accepting it as meeting the [McDaniel] standards?" The trial court gave the appellant an opportunity to submit briefing as to why such a hearing was warranted in this case and specifically requested that the appellant explain which states had rejected the contested scientific evidence. The defense told the trial court that it would submit a brief on persuasive case law.

On July 14, 2003, the appellant filed a memorandum in support of a pretrial McDaniel hearing. However, the memorandum was essentially a history of federal and Tennessee case law on the admissibility of scientific evidence, and it failed to cite a single case in which a court in this state or any other state had ruled that the scientific evidence at issue was unreliable or untrustworthy. We note that the appellant also failed to cite any mandatory or persuasive authority at the motion for new trial hearing or in his appellate brief. In our view, the trial court, which requested further briefing from the appellant on this issue, gave the appellant the opportunity he was seeking to show why the scientific evidence at issue was unreliable. The appellant presented not a scintilla of proof that the scientific evidence was untrustworthy or unreliable. Lastly, we observe that the appellant vigorously cross-examined each expert witness and successfully brought to light many limitations of the various tests and test results. We conclude that the appellant is not entitled to relief.

E. Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to support all of his convictions. The State argues that the evidence is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is “whether, after viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient.

First degree premeditated murder is the "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). "Premeditation" is the exercise of reflection and judgment before the doing of an act. Id. § 39-13-202(d). Circumstances supporting a finding of premeditation include the use of a deadly weapon upon an unarmed victim, the particular cruelty of a killing, the infliction of multiple wounds, the defendant's threats or declarations of intent to kill, the defendant's procurement of a weapon, any preparations to conceal the crime undertaken before the crime is committed, destruction or secretion of evidence of the killing, and a defendant's calmness after a killing. State v. Leach, 148 S.W.3d 42, 53-54 (Tenn. 2004); Bland, 958 S.W.2d at 660. A motive for the killing is another factor from which the jury may infer premeditation. Leach, 148 S.W.3d at 54; State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

The appellant asserts that the record is "simply silent" with regard to any proof that he killed the victim after the exercise of reflection and judgment. We disagree. Taken in the light most favorable to the State, the proof at trial showed that the appellant took his high-powered assault rifle with him to Mike Chattin's house on the afternoon of September 5, 2001. After Chattin and Carol Bishop went to bed, the appellant drove Chattin's maroon Dodge pickup to Nunley's fruit stand. There, he tried to set the stand on fire. When the victim arrived in the Nunley's parking lot, the appellant hid behind the pickup and shot the victim as the victim approached. The evidence established that the appellant shot the victim multiple times. Ballistics testing showed that the bullets recovered from the victim's body were fired from the appellant's rifle. The appellant removed the victim's revolver and part of his bulletproof vest and returned to Chattin's house, where he displayed the items and described the killing to Chattin. Several hours later, multiple witnesses observed the appellant attempting to dispose of the items of evidence along with articles of his own clothing. The appellant told Chattin that he had tried to leave the scene in the victim's patrol car, and fiber comparisons revealed that fibers found in the victim's patrol car were consistent with fibers from clothing that the appellant was seen throwing over Chattin's balcony. Scientific testing revealed that the appellant's DNA was also on the clothing he threw over the balcony. Moreover, the appellant had told witnesses of his animosity toward the police, demonstrating that he had a motive to kill the victim. Based on this evidence, the jury could reasonably and legitimately could have concluded that the appellant committed first degree premeditated murder.

First degree felony murder is defined as a "killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy." Tenn. Code Ann. § 39-13-202(a)(2). In order for a killing to occur "in the perpetration of" the felony, the killing must be "done in pursuance of the unlawful act, and not collateral to it." Farmer v. State, 296 S.W.2d 879, 883 (Tenn. 1956). No culpable mental state is required for a felony murder conviction except the intent to commit the underlying felony. Tenn. Code Ann. § 39-13-202(b). "[I]ntent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim." State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999). "Proof that such intent to commit the underlying felony existed before, or concurrent with, the act of killing is a question of fact to be decided by the jury after consideration of all the facts and circumstances." Id. (citing Hall v. State, 490 S.W.2d 495, 496 (Tenn. 1973); State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993)). "[A] jury may reasonably infer from a defendant's actions immediately after a killing that the defendant had the intent to commit the felony prior to, or concurrent with, the killing." Id. at 108. The appellant contends that the evidence is insufficient to support his convictions for first degree felony murder committed during the perpetration of arson and theft because the State failed to establish that he formed an intent to commit the underlying felonies prior to or during the commission of the victim's murder. Again, we disagree.

Regarding the conviction for the felony murder committed during the perpetration of arson, the proof showed that the appellant learned Charlie Sims believed the owner of Nunley's fruit stand burned down Sims' fruit stand. Several weeks before the victim's death, the appellant suggested to Carl Hankins that they should burn down Nunley's. Gasoline was identified on the appellant's clothing, on the boots he was seen throwing over the balcony of Chattin's house hours after the murder, and in a soil sample taken from underneath a truck parked at the crime scene. As the appellant was describing the night's events to Chattin soon after the shooting, the appellant told Chattin that "Charlie [Sims] had to hear about this." Moreover, the appellant told Chattin that he had tried to burn down the stand but that it would not burn. The jury reasonably could have inferred that the appellant went to Nunley's intending to burn down the fruit stand and killed the victim after being discovered.

With respect to the conviction for the felony murder committed in the perpetration of a theft, the jury heard testimony that the appellant previously had expressed an interest in obtaining a bulletproof vest. After killing the victim, the appellant took the victim's gun and part of the victim's bulletproof vest back to Chattin's house. He then complained to Chattin that he "had wanted a whole vest," not part of one. We conclude that the jury reasonably could have inferred that upon being discovered trying to burn the fruit stand, the appellant formed the intent to kill the victim and take his vest. The evidence is sufficient to support appellant's convictions.

F. Appellant's Statements to Witnesses

Next, the appellant contends that the trial court erred by allowing three witnesses, Malcolm Headley, Carl Hankins, and Mike Anderson, to testify about statements the appellant made to them about his purported hostility toward the police. He asserts that the real purpose for the statements

was to portray him as a "cop-hater" who acted in conformity with this character trait. He concludes that the evidence was inadmissible under Tennessee Rule of Evidence 404(b) and was unduly prejudicial. The State responds that the appellant's statements were relevant to show his state of mind and his motive to kill the victim and were properly admitted. We conclude that the appellant waived this issue with regard to Headley and Anderson and that he is not entitled to plain error relief. As to Hankins' testimony, we conclude that the appellant's statements were relevant and not unduly prejudicial.

At trial, Malcolm Headley testified that he met the appellant while working as a security guard at Dole Fresh Fruits in Gulfport, Mississippi in 1999. Headley said the appellant visited with him and was particularly interested in Headley's military background as a sniper in the Marine Corps. Headley said he had declined the appellant's request to buy a bulletproof vest for the appellant and initially told the appellant that he was not interest in selling him a gun. Headley said that a few months later, he decided to buy a different gun and sold the appellant his old gun, an MAK-90 semiautomatic assault rifle. Asked whether the appellant had expressed any feelings toward law enforcement or the police, Headley said the appellant "had mentioned that he had had trouble with some law officers" and was "trying to get the thing settled." Headley said he understood that the matter "was supposed to go to trial or had a lawyer working on it." Headley said that sometime in 2000, the appellant telephoned him and asked Headley to meet him at a truck stop. There, the appellant told Headley that he was "going to take care of this problem he was having and would see me later." Headley continued as follows:

> Marlon told me that he was going -- I said, "You going up there to court and all?"
>
> And he said, "Well, yeah, and if I could kill somebody, I will, even if I have to sneak up on them and do it."
>
> And I looked at him kind of funny and he was just, "Oh, I'm just joking."

Carl Hankins testified that he became acquainted with the appellant through their mutual friend, Mike Chattin, about three years before the trial. Hankins said that he had been around the appellant on four to six occasions and that the appellant had expressed to him that he "very much disliked the police department, any police officers as far as that goes." Hankins said that at another time, the appellant stated that "he would kill a man before he would ever take a beating like he took before." Hankins could not recall when the appellant made this statement, but he said it was made in the context of discussing police officers and a prior beating the appellant had sustained.

Finally, the defense called Attorney Mike Anderson to the stand. In testifying to a pending civil lawsuit that the appellant had filed against the Chattanooga Police Department and three of its officers, Anderson was asked to read the appellant's answer to an interrogatory. Among several paragraphs detailing his claimed financial, mental, and physical damages, the appellant said, "I've grown to despise the police and feel that they are crooked."

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). In other words, a party may not use character evidence to show that a person acted in a particular way because he or she had a propensity to do so. State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999); State v. Parton, 694 S.W.2d 299, 304 (Tenn. 1985) (observing that evidence of another crime is not admissible to show that the defendant is the kind of person who would tend to commit the offense); State v. Tizard, 897 S.W.2d 732, 743 (Tenn. Crim. App. 1994) (noting that character evidence may not be used to show a propensity to act). Similarly, evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b).

However, such evidence may be admitted for other purposes if relevant to some matter actually at issue in the case and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); State v. Wyrick, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404(b), Advisory Commission Comments; Parton, 694 S.W.2d at 302. Admissibility of other crimes, wrongs, or acts is also contingent upon the trial court finding by clear and convincing evidence that the prior crime, wrong, or act was actually committed. Tenn. R. Evid. 404(b); Wyrick, 62 S.W.3d at 771. The jury may consider evidence admitted under 404(b) as substantive evidence at trial. Wyrick, 62 S.W.3d at 771.

Before the trial court may permit evidence of a prior crime, wrong, or act, the following procedures must be met:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). Provided that the trial court has complied with these procedures, this court will not overturn the trial court's decision to admit or exclude evidence under Rule 404(b) absent an abuse of discretion. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). "However, in view of the strict procedural requirements of Rule 404(b), the decision of the trial court should be afforded no

deference unless there has been substantial compliance with the procedural requirements of the Rule." Id.

1. Appellant's Statements to Headley

The record reflects that the appellant filed a pretrial motion in limine to prohibit Headley's testimony "regarding the sale of an AK 47" rifle to the appellant "or any other hearsay statement, impression, or testimony on the grounds that such testimony would violate Rules 402, 403, 404(a)(b) and not come within any hearsay exception listed in Rule 803 of the Tennessee Rules of Evidence." The trial court deferred ruling on the motion until trial. Just prior to Headley's taking the stand, the defense reminded the court of its pending motion and requested that any testimony regarding the sale of the murder weapon and "some other discussions about ammunition, books, how to make bombs and so forth" be excluded as irrelevant because the statements had been made two years before the murder. In a bench conference, the State said it intended to question Headley about the appellant's attempt to buy a bulletproof vest from him and about the appellant's statement to Headley that the appellant "had to go back, he was having trouble with some policeman, or something to that effect." The trial court concluded that the evidence was "relevant and probative." The following exchange then occurred:

> [The State]: Kiser told [Headley] that he was going back to Tennessee to take care of his problems there, that he would kill someone if he had to, that he would sneak up on someone and kill them if he had to. At that time he had his case pending here in Your Honor's court against the State, where he was charged with assault. And he had also filed this federal police brutality lawsuit and the court may want to limit that, but I think that --
>
> THE COURT: Are you trying to get into all that?
>
> [The State]: No, all I'm going to get into is he made the statement he was coming back to take care of problems and he'd kill somebody if he had to.
>
> [The Defense]: Well, if they're going to ask if he was back here to take care of his problems, we want to ask if he had talked to him about, not the details of it, but the fact that he had a lawsuit pending up here.
>
> [The State]: I wouldn't object to that.
>
> [The Defense]: Well, I think that's only fair. It will give the wrong impression.
>
> . . . .

> [The State]: Let me say this, Judge, I don't think [Headley] knows any details about the lawsuit. I do intend to ask him if Mr. Kiser ever expressed any feelings about the police to him related to what his attitude was about the place, and I think he will say, Well, he didn't like the police, he said they were causing all kinds of problems, that kind of thing.
>
> [The Defense]: And, of course, then we want to bring up the fact that he had filed a lawsuit against them.

The State contends that the appellant has waived any complaint to Headley's testimony because he failed to object specifically to the statements at issue. We agree. The appellant initially objected to Headley's testifying that the appellant sold him a gun, but he never objected to Headley's statements about the appellant's animosity toward the police. Even when the State announced that it was going to ask Headley about the appellant's statements, the defense failed to object or express any concern about that line of questioning. See Tenn. R. Evid. 103(a)(1). Therefore, the appellant has waived the issue. See Tenn. R. App. P. 36(a) (providing that our rules do not require "relief [to] be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error").

As we explained previously, this court may analyze any error under the plain error doctrine. See Tenn R. Evid. 103(d). However, given the strength of the State's case, we conclude that consideration of the error does not does not meet the test for plain error review.

2. Appellant's Statements to Carl Hankins

The record reflects that during Carl Hankins' testimony, the State asked him if he had ever heard the appellant express his feelings about the police. Hankins said, "He very much disliked the police department, any police officers as far as that goes." The defense objected, stating only that "we object to that." The trial court sustained the objection as to the last part of Hankins' answer, saying that the last part of the answer "was just kind of thrown in. It wasn't in response to your question. He answered your question, then he added something else there at the end." The State's questioning of Hankins resumed, and the State began asking him about what occurred at Mike Chattin's house on the evening of May 5. Shortly thereafter, the State asked for a jury-out hearing. The State informed the trial court that Hankins "simply [is] not saying what he said three days ago and we'd like to kind of question him, I guess outside the presence of the jury, cross-examine him I guess, as a hostile witness." During the jury-out hearing, Hankins stated that the appellant said he would kill a man before "he'd let him take him back to jail," that the appellant was suing the city for police brutality, and that the appellant said "he would never let them beat him up again." The defense objected, arguing that the appellant's statements to Hankins were irrelevant and highly prejudicial. The trial court ruled that the appellant's statements were relevant to his attitude toward law enforcement officers.

The appellant contends that Hankins' statements should have been excluded under Tennessee Rule of Evidence 404(b) because the statements were "introduced to show action in conformity with the character trait, that defendant was a 'cop-hater.'" He also argues that the statements should have been excluded because they occurred far in advance of the shooting. Regarding Hankins' statement that the appellant disliked the police department, we note that the appellant did not state the ground for his objection. See Tenn. R. Evid. 103(a)(1) (stating that "[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context"). Moreover, the appellant never argued at trial that any of Hankins' testimony was inadmissible under Tennessee Rule of Evidence 404(b). A party is bound by the evidentiary theory argued to the trial court and may not change or add theories on appeal. See State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993). Thus, this court may consider only the arguments presented to the trial court as to why the testimony should have been admitted into evidence. The appellant argued that Hankins' statements were inadmissible because they were irrelevant and too remote in time to the crime.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

In this case, the State revealed during opening statements that its theory of the case was that the appellant killed the victim "because he wanted to kill a police officer. . . . [B]ecause it made him feel good." We conclude that the appellant's general animosity toward the police was relevant to this theory. See State v. Gentry, 881 S.W.2d 1, 7 (Tenn. Crim. App. 1993) (evidence that defendant held a grudge against Tennessee Valley Authority (TVA) employees was relevant to show defendant killed a TVA employee who came onto his land); State v. Frankie E. Casteel, No. E1999-00076-CCA-R3-CD, 2001 LEXIS 248, at *36 (Knoxville, Apr. 5, 2001), perm. to appeal denied, (Tenn. 2001) (defendant's general animosity toward trespassers was relevant to show his premeditation and motive to kill the victims); State v. John Henry Wallen, No. 03C01-9304-CR-00136, 1995 LEXIS 947, at *5 (Knoxville, Nov. 30, 1995) (evidence that defendant held a grudge against police officers in general was relevant to show he premeditated killing state police trooper). Moreover, although the evidence was prejudicial, we do not believe the probative value of the evidence substantially outweighed the danger of unfair prejudice. See Gentry, 881 S.W.2d at 7 (stating that "the mere fact that evidence is particularly damaging does not make it unfairly prejudicial"). As to any argument regarding the remoteness of the statements, "remoteness affects only the weight, not the admissibility of the evidence." State v. Smith, 868 S.W.2d 561, 575 (Tenn. 1993). Thus, the appellant is not entitled to relief.

3. Attorney Mike Anderson's Testimony

During the appellant's case-in-chief, the State asked that it be allowed to cross-examine Mike Anderson about the appellant's answer to an interrogatory question in the appellant's civil lawsuit against the Chattanooga Police Department. The State claimed that the answer, in which the appellant stated that he had grown to despise the police and believed they were crooked, was relevant to the appellant's motive and state of mind. The defense argued that it was only calling Anderson to the stand to testify as to the time of his scheduled appointment with the appellant and to show where the appellant was going when he left Mike Chattin's house on September 7. The defense stated that it was not going to question Anderson about the lawsuit and that "it would be inappropriate for the State to be allowed to just parse out the portion of the interrogatories." The trial court ruled that the appellant's answer in the interrogatories was relevant to the appellant's "state of mind of showing that he despised cops."

Once again, the appellant argues that such testimony is character evidence that is inadmissible under Tennessee Rules of Evidence 403 and 404. However, the appellant never raised such an argument at trial. As we explained with Carl Hankins' testimony, we conclude that the appellant's answer to the interrogatory question was relevant to the State's theory of the case. Therefore, the trial court properly concluded that Anderson's testimony was admissible.

G. Limitations on Tina Hunt's Testimony

At trial, the appellant sought to prove that Mike Chattin killed the victim and framed the appellant for the murder. The defense theorized that Chattin was angry that his wife, Tina Marie Hunt, had left him. The appellant contends that the trial court erred by not allowing Hunt to testify about an affair she had with the appellant fifteen years earlier, while she was married to Chattin. He also contends that the trial court further erred by limiting Hunt's testimony regarding the basis for a protective order she obtained against Chattin after leaving him six months before the murder. He submits that both areas of questioning were relevant to establishing that Chattin had animosity towards the appellant as well as the police, thus giving him a motive to frame the appellant for the victim's murder.

During voir dire examination, Tina Hunt testified that she was married to Chattin for seventeen years and eventually left him because of his "mental, physical and drug abuse." She said she feared Chattin and obtained an order of protection less than one month after leaving him because he stalked her by sending her messages and observing her at the Sonic where she worked. Hunt said she knew the appellant and had worked with him at a grocery store fifteen years ago. She said she had an affair with the appellant at that time and that Chattin was aware of and had encouraged the affair. Hunt said that she had called the police more than once to report Chattin was violating the terms of the protective order and that she once had requested an escort home because she feared Chattin would follow her to her new apartment. At first, Hunt said she was "pretty sure" the victim responded to one of her calls at the Sonic. She then said "I'm positive I spoke to him once." Hunt

said she left town in May 2001 with another Sonic employee named John whom she later married.

The trial court ruled that Hunt could testify that she worked with the appellant fifteen years earlier but disallowed "this testimony of the affair 15 years earlier," finding that "that's not relevant, it's remote in time." The trial court ruled that it also would allow Hunt to testify that she had obtained a protective order against Chattin. The court also ruled that Hunt could testify that she suffered verbal and physical abuse during her marriage to Chattin and that he stalked her after she left him.

As to the appellant's claim that Hunt should have been allowed to testify about her affair with him fifteen years earlier, we agree with the trial court that the testimony was irrelevant. Hunt testified during voir dire that Chattin had known about the affair and even encouraged it and that Hunt and Chattin remained married for many years after the affair. Hunt testified that she left Chattin because of his physical and verbal abuse and his drug abuse. Furthermore, Chattin had already testified that he and the appellant were friends and that he allowed the appellant to live in his home after the appellant returned to Chattanooga looking for work. No witness testified about any tension or difficulties between the two men, and no evidence indicated that the affair had anything to do with the victim's death. We conclude that the trial court did not abuse its discretion by concluding Hunt's testimony about the affair was irrelevant. State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004) (a trial court's ruling on evidence will be disturbed only upon a clear showing of abuse of discretion).

Regarding the appellant's claim that the trial court improperly limited testimony about the protective order, Hunt testified in front of the jury that Chattin was physically and verbally abusive and used drugs during their marriage. She stated that she obtained an order of protection a few weeks after she left Chattin and that Chattin had family and friends contact her at work. She said she would see Chattin across the street from the Sonic and that she telephoned the police six or eight times. She said she thought the victim responded to one of her calls. In his brief, the appellant states, without any explanation, that Hunt should have been allowed to testify about "the nature of the protective order." However, in our view, the "nature" of the protective order was fully explored. The appellant is not entitled to relief.

H. Exclusion of Mike Chattin's Alleged Confession

Next, the appellant contends that the trial court erroneously excluded evidence of an alleged "confession" Mike Chattin made to the murder. He asserts that the evidence was "critical" to establishing that Chattin killed the victim. The State contends that the trial court properly ruled the evidence was inadmissible hearsay. We agree with the State.

The record reflects that in August 2003, Hamilton County Public Defender Ardena Garth received an anonymous telephone call. The caller told Garth that the appellant did not shoot the victim, that he possessed a tape recording in which Mike Chattin had confessed to the murder, and that it was "[t]he witness and another black guy." The caller said that he had "set Mike [Chattin] up

on a cocaine deal" with the TBI and that "the same black guy, got a life sentence back last year." The caller claimed to have "a tape of Mike [Chattin] telling me that when he got home, that night, that your client was in the bed." The caller further stated that he could not let an innocent man go to jail and that on the tape, Chattin told him the "story" of how the victim was shot by the "witness and a black guy" as the result of a drug deal gone bad. He said Chattin told him that after the shooting, Chattin and his girlfriend drove around for a while to get their story straight. The caller also claimed to have a tape recording of "Joe Copeland telling me why . . . he [didn't] arrest [Chattin] on the cocaine charges that I set him up for." The caller told Garth that he would give her the tapes before trial but that "I've been under . . . scrutiny about this. I mean I've been confronted [by] a couple of people about it and boy they made me hush up real quick." The caller also said, "They put major pressure on me when I . . . when I leaked the fact that I had the tape. He said if you've ever taped me I'll get you." The caller claimed he would contact Garth again but never did and never delivered the tapes to her.

During a jury-out hearing, TBI Agent Joe Copeland testified that he headed a drug investigation unit and had employed a confidential informant named Donald Mack Heard from May 2000 until April 2002. He said Heard's job was to introduce agents to people interested in buying or selling illegal drugs. Agent Copeland said Heard informed him that Mike Chattin was interested in trading a Corvette and some guns for cocaine. On another occasion, Chattin introduced Heard to a group of cocaine dealers. Agent Copeland said he attended a meeting in January 2002 with other law enforcement officers. Copeland said he related Heard's information about Mike Chattin to the officers at the meeting as reflected in a January 7, 2002 handwritten memorandum. The memorandum states, in pertinent part, that

> Mike Chattin approached TBI Informant 1st going to sell/trade his Corvette for cocaine & Joe found out lien too much on the owed on the Corvette and next approached TBI [illegible] & wanted to trade several guns for cocaine.

Agent Copeland further testified that Heard never told him Chattin had confessed to murdering the victim and that Heard never claimed to know who was responsible for the murder. Agent Copeland said that Heard set up a cocaine deal with Chattin after the victim's death but that the deal never went through. Agent Copeland stated that he never personally spoke with Chattin and that all of the information he had about Chattin was provided by Heard.

At the conclusion of the hearing, the defense moved to introduce Garth's tape recording with the anonymous caller and the written memorandum into evidence. The defense argued that the tape recording was admissible as a statement against the penal interest of the declarant, Heard, because Heard was violating a federal law and obstructing justice. The defense also argued that the recording was admissible as a prior inconsistent statement to impeach Chattin. The trial court ruled that the tape was inadmissible, concluding that a tape-recorded statement of an unidentified caller, reporting that he was in possession of another tape recording in which Chattin allegedly confessed to the victim's murder, did not constitute a statement against the caller's interest because in choosing to

remain anonymous, the caller did not reasonably believe he was subjecting himself to any kind of liability. The trial court held that the defense's attempts to establish the identity of the caller as Mack Heard and the fact that Heard was "unavailable" to testify did not change its ruling.[1] Regarding the memorandum, the defense argued that it was admissible under the business record exception to the hearsay rule. However, the trial court disagreed, concluding that the memorandum was "not customarily something that's kept in the ordinary course of business as a business record." The appellant contests these findings.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802.

1. Tape Recording

Tennessee Rule of Evidence 804(b)(3) provides that a statement against interest made by an unavailable declarant is admissible at trial as an exception to the hearsay rule as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The appellant contends that "the question of whether the caller's anonymity negates the tendency of the statement to subject him to criminal liability is an issue of first impression in Tennessee." The appellant submits that with advances in modern technology, the caller in this case should have reasonably expected that he would be identified after reporting a suspect in a high-profile murder case to a public agency.

Initially, we note that the appellant has failed to cite any authority in support of this argument. As such, this issue is waived. See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). In any event, we conclude that the trial court did not abuse its discretion by refusing to admit the tape recording into evidence. See Robinson, 146 S.W.3d at 490. Exceptions to the hearsay rule have been carved out for hearsay statements that "bear sufficient indicia of reliability and trustworthiness to warrant admission." State v. Henry, 33 S.W.3d 797, 802 (Tenn. 2000). Declarations against penal interest offered by the accused do not have to be corroborated. Tenn. R. Evid. 804(b)(3), Advisory Commission Comments. "However, when information is provided by an anonymous citizen, this raises heightened concerns about the reliability of the information, such as the possibility of 'false reports, through police fabrication or from vindictive or unreliable informants.'" State v. Wilhoit,

[1]The trial court concluded that Heard was "unavailable," and the State did not contest that ruling.

962 S.W.2d 482, 487 (Tenn. Crim. App. 1997) (quoting State v. Pulley, 863 S.W.2d 29, 31 (Tenn. 1993)). The trial court makes a determination as to the believability of the statements, and this court will not overturn that decision absent an abuse of discretion. State v. James Blanton, No. 01C01-9307-CC-00218, 1996 LEXIS 276, at 95 (Nashville, Apr. 30, 1996).

In this case, the identity of the caller was never established conclusively. The trial court concluded that the caller's statements were inadmissible because the caller, thinking he would never be discovered, did not believe he was subjecting himself to any criminal liability. We agree. See United States v. Burks, 36 M.J. 447, 451 n.2 (C.M.A. 1993) (stating that "we are at a loss to understand how it may logically be concluded that the *anonymous* writer of a self-incriminating letter has made any statement that truly is against the writer's penal interests"); State v. Tucker, 414 S.E.2d 548, 555 (N.C. 1992) (providing that in order for a hearsay statement to be admissible under this exception to the hearsay rule, the statement "must actually subject the declarant to criminal liability" and that "[a]n anonymous letter does not satisfy this element because a declarant who conceals his identity does not tend to expose himself to criminal liability"). Furthermore, a declarant's statements should not be admitted under this exception to the hearsay rule "if it is established that the declarant did not know that the statement was harmful. For example, if the declarant actually believed that he or she was saying something that would be helpful, reliability is questionable and the statement should not be admitted under this hearsay exception." Neil P. Cohen et al., Tennessee Law of Evidence, § 8.36[5] (5th ed. 2005). The caller obviously believed he was saying something helpful, informing Garth that he could not allow an innocent man go to jail.

Finally, we seriously question the reliability of the caller's statements. The caller, a purported drug dealer, contacted Garth almost two years after the victim's death, claiming that Mike Chattin and an African-American man killed the victim. The caller also stated that he "set up" Mike Chattin on a drug deal with the TBI and that he did not understand why the TBI had not arrested Chattin for the deal. Such statements indicate the caller may have held a grudge against Chattin and had reason to falsely accuse him of the crimes. The caller also falsely stated that he would contact Garth again and deliver the tapes to her. Therefore, we do not believe the tape-recording was sufficiently reliable to be admissible as a declaration against penal interest.

Next, we turn to the appellant's argument that the tape recorded statement was admissible to impeach Chattin. At trial, Chattin testified that he did not kill the victim and never told anyone that he did. Impeachment of a trial witness by extrinsic evidence of a prior inconsistent statement is permitted pursuant to Tennessee Rule of Evidence 6.13(b). In this case, the tape recorded statement that the defense sought to introduce was not Chattin's statement but another party's statement, purportedly Mack Heard. We conclude that the trial court properly disallowed the statement as Chattin's "prior inconsistent statement" and properly concluded that it was not otherwise admissible.

2. Memorandum

With respect to the TBI memorandum, the trial court rejected the appellant's argument that it was admissible pursuant to Tennessee Rule of Evidence 803(6) as a business record of Heard's

work as a confidential informant. The trial court found that the memorandum was not a business record kept by the TBI in the ordinary course of business but was simply a reference to its conversations with a confidential informant. We have examined the document in question, which appears to be nothing more than the handwritten minutes from a meeting in which TBI Agent Copeland related information he had received from Heard about Chattin's interest in purchasing or trading various personal items for drugs. Even assuming that the document falls with Rule 803(6)'s broad definition of a "business record," it fails to satisfy the Rule's requirement that Mack Heard, the person who furnished the information to Agent Copeland, had a business duty to do so. See Tenn. R. Evid. 803(6). The trial court properly concluded that the January 7, 2002 memorandum was inadmissible under the business records hearsay exception.

I. Instruction on Reasonable Doubt

The appellant contends that he is entitled to a new trial because the jury instruction on reasonable doubt included "doubt that may arise from possibility." He contends that this inclusion "suggests an improperly high degree of doubt for acquittal and lowers the prosecution's burden of proof" but concedes that the Tennessee Supreme Court and the Sixth Circuit Court of Appeals have rejected past challenges to various similar formulations of the reasonable doubt instruction given here.

At the guilt phase of the trial, the jury was instructed on the concept of reasonable doubt as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

At the penalty phase, the trial court gave the jury an almost identical instruction on reasonable doubt.

In State v. Bush, 942 S.W.2d 489, 521 (Tenn. 1997), the Tennessee Supreme Court upheld the use of the "moral certainty" language used together with the phrases "let the mind rest easily" and "arise from possibility" identical to the language of the instruction in the present case. The court in Bush observed that although "neither of these phrases have been before the United States Supreme Court, the courts of this state have consistently upheld the constitutionality of this instruction." Id. (citing State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S. Ct. 909 (1995); Pettyjohn v. State, 885 S.W.2d 364 (Tenn. Crim. App.), app. denied, (Tenn. 1994); State v. Christopher S. Beckham, No. 2C01-9405-CR-00107, 1995 Tenn. Crim. App. LEXIS 799 (Jackson, Sept. 27, 1995); Richard Caldwell v. State, No. 02C01-9405-CR-00099, 1994 Tenn. Crim. App.

LEXIS 85 (Jackson, Dec. 28, 1994), perm. to appeal granted in part, denied in part, (Tenn. 1995); State v. Victoria Voaden, No. 01C01-9305-CC-00151, 1994 Tenn. Crim. App. LEXIS 845 (Nashville, Dec. 22, 1994), perm. to appeal denied, (Tenn. 1995); Harold V. Smith v. State, No. 03C01-9312-CR-00393, 1994 Tenn. Crim. App. LEXIS 399 (Knoxville, July 1, 1994). The Bush court concluded that the challenged instruction did not violate the appellant's rights under either the United States Constitution or the Tennessee Constitution.

This court is bound to conclude that the reasonable doubt instruction in the appellant's case did not violate his due process rights. The appellant is not entitled to relief on this issue.

J. Appellant's Waiver of Rights at Sentencing

After the jury returned its verdict convicting the appellant, he instructed his attorneys not to present any mitigating evidence or argument at sentencing. Defense counsel informed the trial court of the appellant's decision. Following its examination of the appellant and inquiries directed to defense counsel, the trial court allowed the appellant to waive the presentation of mitigation evidence. The appellant challenges that ruling, claiming that (1) the trial court erred by failing to order a competency hearing, (2) the appellant's waiver of his constitutional rights at sentencing was ineffective; and (3) the procedures by which a capital murder defendant in Tennessee is permitted to waive his constitutional sentencing rights are unconstitutional.

The Tennessee Supreme Court has emphasized the importance of presenting mitigating evidence in a capital sentencing proceeding "because of the belief . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse." Zagorski v. State, 983 S.W.2d 654, 658 (Tenn. 1998) (quoting Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). In Zagorski, the capital defendant also instructed his attorneys to forgo the presentation of any defense at sentencing. Id. at 658. The record reflected that the defendant was competent and that his decision was knowing and voluntary. Despite the significance of mitigating evidence to the sentencing determination, the court recognized the right of a competent and fully informed defendant to waive his right to present such evidence to the jury. Id. at 658. The supreme court set forth the following procedure that trial courts should follow in prospective cases when faced with a capital defendant who refuses to permit the investigation and/or presentation of mitigating evidence against his attorneys' advice:

> [C]ounsel must inform the trial court of these circumstances on the record, outside the presence of the jury. The trial court must then take the following steps to protect the defendant's interests and to preserve a complete record:
>
> > 1. Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right

> and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial;
>
> 2. Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and
>
> 3. After being assured the defendant understands the importance of mitigation, inquire of the defendant whether he or she desires to forego the presentation of mitigating evidence.

Id. at 660.

In the present case, the trial court began its voir dire examination of the appellant by ensuring that the waiver of his right to testify on his own behalf at sentencing was valid. Next, the court questioned the appellant and counsel about the appellant's decision to forgo the presentation of any mitigating proof. Essentially answering, "Yes, sir," to all of the court's questions, the appellant said he understood what was meant by "mitigating evidence" and was aware of his right to present such evidence at sentencing. He said that he had discussed mitigating evidence with his attorneys, that he understood it could be used to offset the aggravating circumstance, and that he risked having nothing to offset the aggravating circumstance by failing to present any mitigating proof. One of the appellant's attorneys stated that although counsel had discussed the risks involved in this decision with the appellant, they had done so "only in general terms" because the appellant had "refused for some months now to allow us to actually present to him what we would be presenting in the hearing itself." Upon further questioning, the appellant said that he understood counsel had investigated the possibilities of mitigating circumstances in his case and that he was aware his attorneys were prepared to present their evidence to the jury. Upon being asked, "[K]nowing all that, is it your conscious decision and your voluntary decision to forego presenting any mitigating evidence in this trial? " the appellant told the trial court, "That is correct."

At that point, the prosecutor requested that the trial court satisfy itself that the appellant's attorneys had in fact investigated, were prepared to present their evidence in mitigation, and had informed the appellant about the results of their work. The trial court reviewed the appellant's proposed jury instructions regarding mitigating evidence. In addition, defense counsel advised the court of the mental health experts' reports it had filed pretrial under seal. The trial court commented:

> Let me say further, that after listening to Mr. Kiser in this case and counsel, I do find that Mr. Kiser is competent to waive mitigation in this case and I do find that he is waiving the presentation of

> mitigating evidence knowingly and voluntarily and understandingly at this time. So is there anything else?

The prosecutor suggested that defense counsel summarize the testimony of the witnesses they had planned to present in mitigation, reasoning that "if he has refused to hear what mitigation proof they have prepared, it would be difficult for him, then, to understand and know what would have been presented, and, therefore, to waive it." The prosecutor also suggested that the trial court ask defense counsel "whether there was any indication, based on what counsel knew, that the defendant was somehow incompetent to make the decision."

Regarding the appellant's competency, one of the appellant's attorneys advised the court that one expert had reported a brain lesion "which would go to controlling Mr. Kiser's impulsivity and his decision-making functions" and "that is a mental illness . . . in terms of the brain injury and some of the after effects of the brain injury." The attorney stated that she had no indication the appellant was incompetent to make the decision. Asked whether the brain injury had affected the appellant"s ability to communicate with counsel regarding his case, counsel said she had noticed only that the appellant was a "very concrete thinker; once he seems to have his mind made up to something, it's that way or no way." She added, "It's been difficult at times to try to explain to Mr. Kiser some of the concepts of mitigation, but that's about it." She said the appellant's decision was not sudden but had been indicated for some time. A second attorney stated that the appellant's "complex reasoning is sometimes difficult and he's very stubborn" but that she had no questions about his competency to make the decision. The second attorney noted that she "had long-term discussions with him about this and he's made that very clear to me, to the point of being angry with me for trying to discuss it." The court concluded that the appellant knowingly, voluntarily, and understandingly waived the right to present mitigating evidence. Lastly, the court gave defense counsel an opportunity to discuss their case in mitigation with the appellant as follows:

> THE COURT: All right. I know you said that that won't affect his ability, or his decision, but I still want to give you time to do that so that he will know what the mitigating evidence would have been.
>
> [Defense Counsel]: Do you want us just to do this here at the table?
>
> [THE COURT]: Yes, that's fine, just take a few minutes to do that.

The appellant contends that due process required further inquiry into his competency to waive his sentencing rights. He specifically challenges the trial court's "perfunctory" inquiry into the his competency and concludes that a recess for a full competency evaluation was demanded. We disagree. Following Zagorski, a capital defendant's waiver of his rights at sentencing has been upheld following an inquiry substantially similar to that undertaken in the present case. See State

v. Smith, 993 S.W.2d 6, 14-16 (Tenn. 1999). We recognize that in Smith, defense attorneys responded that they did not have "anything that would justify any claim that he was incompetent" when asked whether any expert psychological proof existed regarding the defendant's competency. Id. at 14. In the present case, counsel informed the trial court of an expert's report stating that the appellant had suffered a brain injury with resulting mental illness. Expert proof notwithstanding, both defense attorneys maintained that they had no reason to question the appellant's competence. The first attorney said that the appellant's decision was not made on impulse and that he had considered waiving mitigating evidence for some time. The second attorney said that she had discussed presenting proof in mitigation at length with the appellant and that he was very clear in expressing his opposition to that idea. As in Smith, we conclude that the record supports the trial court's finding that the appellant was "competent and fully informed when he decided to waive his rights." Id. at 16. As our supreme court has stated, "[a] competent defendant's right to make the ultimate decisions in his or her case once having been fully informed of the rights and the potential consequences involved" must be preserved. Zagorski, 983 S.W.2d at 661. The appellant is not entitled to relief on this issue.

K. Denial of Instruction on Residual Doubt

The appellant contends that the trial court erred by denying his requested instruction charging the jury that it could consider as a non-statutory mitigating circumstance any evidence presented at trial "which suggests that notwithstanding the verdict of guilt, there is some residual doubt as to Mr. Kiser's guilt." As a part of his argument, the appellant challenges the constitutionality of Tennessee Code Annotated Section 39-13-204(e)(1). That section provides, in pertinent part, that "a reviewing court shall not set aside a sentence of death or of imprisonment for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j)." The State responds that the appellant was entitled to a residual doubt instruction, but concludes that the trial court's failure to charge the jury as requested was harmless error. We agree with the State.

Residual doubt is a nonstatutory mitigating circumstance. Tenn. Code Ann. § 39-13-204(e)(1); State v. Thomas, 158 S.W. 3d 361, 403 (Tenn. 2005) (citing State v. McKinney, 74 S.W.3d 291, 307 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001)). “Thus, where the issue of residual doubt is raised by the evidence, a jury instruction is appropriate.” Id. (citing State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996)). Such evidence "may consist of proof . . . that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." McKinney, 74 S.W.3d at 307. In the present case, the appellant did not testify in his own defense. The defense did, however, introduce proof in support of its theory that someone else, namely Mike Chattin, had the motive, means, and opportunity to kill the victim and then blame the appellant. In addition, the defense sought to establish an alibi for the appellant through neighbor Kim Bowman, who testified that she saw the appellant sleeping on Chattin's couch and did not see him leave the house at the time of the murder. Based on such evidence, the appellant was entitled to the requested instruction on residual doubt.

A defendant's right to have the jury instructed on nonstatutory mitigating circumstances is statutory rather than constitutional in nature. Accordingly, we employ a harmless error analysis in considering the trial court's failure to instruct the jury on a nonstatutory mitigating circumstance that is properly raised by the evidence presented. See State v. Hodges, 944 S.W.2d 346, 351-52 (Tenn. 1997); see also Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). A charge should be considered prejudicially erroneous if it fails to submit the legal issues fairly or if it misleads the jury as to the applicable law. Hodges, 944 S.W.2d at 352. "However, if 'by their breadth, the instructions on nonstatutory mitigating circumstances encompassed all the evidence presented by the defense,' the omission of an instruction on a specific mitigating circumstance is harmless." Thomas, 158 S.W.3d at 403 (quoting Hodges, 944 S.W. 2d at 356). In the appellant's case, as in Thomas, the trial court instructed the jury to consider in mitigation "any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence." This "catch-all" mitigating evidence instruction "served to give the jury the opportunity and duty to consider any residual doubts about his culpability." Id. at 403-04.

We conclude that the trial court erred by failing to instruct the jury that it could consider any residual doubt of the appellant's guilt as a mitigating factor at sentencing. The error was harmless, however, in view of the trial court's general instruction encompassing any lingering doubt of the appellant's guilt. The petitioner is not entitled to relief on this issue.

L. Unanimous Jury Verdict Required for Life Sentence

The appellant asserts that requiring a jury to unanimously agree to a life sentence violates the Supreme Court's holdings in Mills v. Maryland,486 U.S. 367, 108 S. Ct. 1860 (1988), and McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227 (1990). However, this argument has been repeatedly rejected. See State v. Ivy, 188 S.W.3d 132, 163 (Tenn. 2006) (citing State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994); State v. Thompson, 768 S.W.2d 239, 250 (Tenn. 1989); State v. King, 718 S.W.2d 241, 249 (Tenn. 1986), superseded by statute as recognized by, State v. Hutchinson, 898 S.W.2d 161 (Tenn. 1994)).

M. Failure to Include Aggravating Circumstance in Indictment

The appellant challenges our supreme court's interpretation of Tennessee Rule of Criminal Procedure 12.3(b) whereby a district attorney general may institute a capital murder prosecution by filing notice with no requirement that aggravating circumstances be charged in the indictment. See e.g. State v. Hugueley, 185 S.W.3d 356, 392-93 (Tenn. 2006) (appendix). He asserts that the current interpretation of the rule violates his state and federal due process rights and the principles announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and its progeny and demands that he be granted a new trial.

Our supreme court has repeatedly rejected the appellant's argument that the State must charge the aggravating circumstances in the indictment, beginning with its decision in State v. Dellinger, 79 S.W.3d 458, 466-67 (Tenn. 2002); see also State v. Odom, 137 S.W.3d 572, 591 (Tenn. 2004);

State v. Holton, 126 S.W.3d 845, 862-63 (Tenn. 2004); State v. Carter, 114 S.W.3d 895, 910 n.4 (Tenn. 2003). On revisiting the issue, the court concluded that subsequent decisions extending and clarifying the application of Apprendi did not alter its holding in Dellinger. See State v. Berry, 141 S.W.3d 549, 559 (Tenn. 2004). The appellant is not entitled to relief on this issue.

N. Prosecutor Vested with Unlimited Discretion to Seek Death Penalty

The appellant argues that prosecutors' unlimited discretion in this state to decide whether to seek the death penalty in a first degree murder case causes the system as a whole to be arbitrary and capricious. Our supreme court has rejected this argument. See State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995).

O. Death Penalty imposed in a Discriminatory Manner

Next, the appellant contends that the death penalty is imposed in a discriminatory manner. More specifically, he cites various studies that he asserts reflect that the death penalty is imposed differently against capital murder defendants along racial, geographical, and gender lines. This claim has also been consistently rejected. See Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 23 (Tenn. 1993).

P. Cumulative Effect of Errors at Trial

The appellant argues that he was denied a fundamentally fair trial as a result of the cumulative effect of the errors at his trial. He focuses specifically on his claims of the erroneous admission of "propensity" or Rule 404(b) evidence against him and the exclusion of evidence that he contends pointed to Mike Chattin as the victim's killer. However, this court has concluded that the admission of Carl Hankins' and Mike Anderson's testimony about statements the appellant made proclaiming his hostility toward the police was not error and that any error regarding Malcolm Headley's testimony was harmless. We also concluded that the trial court's failure to give the residual doubt instruction was harmless. Given that no other errors exist, there is no "cumulative effect of errors" to consider. The appellant is not entitled to relief.

Q. Lack of Meaningful Proportionality Review of Death Sentence

The appellant claims that a lack of meaningful standards employed in the mandatory proportionality review of death sentences in this state effectively results in a system where nearly every death sentence will be deemed proportionate. Our supreme court has repeatedly upheld the comparative proportionality review undertaken by the appellate courts in this state as meeting state constitutional standards. See State v. Vann, 976 S.W. 2d 93, 118 (Tenn. 1998) (appendix); State v. Keen, 926 S.W.2d 727, 743-44 (Tenn. 1994); State v. Barber, 753 S.W.2d 659, 663-668 (Tenn. 1988); State v. Coleman, 619 S.W.2d 112, 115-16 (Tenn. 1981).

R. Lethal Injection is Unconstitutional

The appellant argues that death by the current three-drug lethal injection protocol constitutes cruel and unusual punishment. He concedes that this argument has been rejected by the Tennessee Supreme Court. See Abu-Ali Abdur'Rahman v. Bredesen, et al., 181 S.W.3d 292, 309 (Tenn. 2005). However, he raises the issue here to preserve it for further review. See State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233 (2001); State v. Pike, 978 S.W.2d 904, 925 (Tenn. 1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025 (1999); Nesbit, 978 S.W.2d at 902-03; State v. Vann, 976 S.W.2d at 118 (Tenn. 1998); State v. Blanton, 975 S.W.2d 269, 286 (Tenn. 1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1118 (1999); State v. Cribbs, 967 S.W.2d 773, 796 (Tenn. 1998), cert. denied, 525 U.S. 932, 119 S. Ct. 343 (1998); State v. Cauthern, 967 S.W.2d 726, 751 (Tenn. 1998), cert. denied, 525 U.S. 967, 119 S. Ct. 414 (1998); State v. Brimmer, 876 S.W.2d 75, 88 (Tenn. 1994).

We note that the United States District Court for the Middle District of Tennessee recently held that the three-drug protocol currently used in this state violates the U.S. Constitution's Eighth Amendment protection against cruel and unusual punishment. See Edward Jerome Harbison v. Bredesen, No. 3:06-01206, 2007 U.S. Dist. LEXIS 72410 (M.D. Tenn, July 9, 2007). Moreover, the United States Supreme Court has granted a writ of certiorari in Ralph Baze v. John D. Rees, Commissioner, No. 07-5439, 2007 U.S. LEXIS 11115 (Sept. 25, 2007), which challenges the constitutionality of Kentucky's standard 3-drug lethal injection protocol. However, our supreme court, noting that Harbison is only persuasive authority and that the United States Supreme Court has not invalidated Tennessee's three-drug combination, has refused to grant a capital case defendant's request for a stay of execution pending resolution of this issue. See State v. Pervis T. Payne, No. M1988-00096-SC-DPE-DD, (Tenn. Oct. 22, 2007) (order). Therefore, we are compelled to conclude that the appellant is not entitled to relief.

S. Mandatory Review

Tennessee Code Annotated section 39-13-206(c)(1)(D) mandates that this court determine: (1) whether the sentence of death was imposed in any arbitrary fashion; (2) whether the evidence supports the jury's finding of statutory aggravating circumstances; (3) whether the evidence supports the jury's finding that aggravating circumstances outweigh any mitigating circumstances; and (4) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the appellant. The comparative proportionality review "is designed to identify aberrant, arbitrary, or capricious sentencing." State v. Stout, 46 S.W.3d 689, 706 (Tenn. 2001). It does this by determining whether the death penalty in a given case is "'disproportionate to the punishment imposed on others convicted of the same crime.'" Bland, 958 S.W.2d at 662 (quoting Pulley v. Harris, 465 U.S. 37, 43, 104 S. Ct. 871, 876 (1984)). If a case is "'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." Stout, 46 S.W.3d at 706 (quoting Bland, 958 S.W.2d at 668).

In conducting our proportionality review, this court must compare the present case with cases involving similar defendants and similar crimes. See id.; see also Terry v. State, 46 S.W.3d 147, 163-64 (Tenn. 2001). We select only from those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. See State v. Carruthers, 35 S.W.3d 516, 570 (Tenn. 2000); see also Godsey, 60 S.W.3d at 783.

We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. See Terry, 46 S.W.3d at 163 (citing Hall, 958 S.W.2d 679, 699 (Tenn. 1997)). This presumption applies only if the sentencing procedures focus discretion on the """particularized nature of the crime and the particularized characteristics of the individual defendant.""" Id. (quoting McCleskey v. Kemp, 481 U.S. 279, 308, 107 S. Ct. 1756, 1775 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 206, 96 S. Ct. 2909, 2940-41 (1976))).

Applying this approach, in comparing this case to other cases in which defendants were convicted of the same or similar crimes, this court looks "at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved." See id. at 164. Regarding the circumstances of the crime itself, numerous factors are considered, including the following:

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of provocation; (7) the absence or presence of premeditation; (8) the absence or presence of justification; and (9) the injury to and effect on non-decedent victims.

Stout, 46 S.W.3d at 706; see also Terry, 46 S.W.3d at 164. Contemplated within the review are numerous other factors, including the appellant's "(1) prior criminal record; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." Stout, 46 S.W.3d at 706; Terry, 46 S.W.3d at 164. In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." Terry, 46 S.W.3d at 164. Thus, our function is not "to limit our comparison to those cases where a defendant's death sentence 'is perfectly symmetrical,' but only to 'identify and to invalidate the aberrant death sentence.'" Id. (quoting Bland, 958 S.W.2d at 665).

In applying these factors to the present case, the proof showed that the appellant went to the crime scene intending to burn Nunley's fruit stand. However, he also took a camouflaged, high-powered assault rifle with him. When the victim pulled into the parking lot, presumably to investigate, the appellant hid behind the pickup truck he had driven to the scene and waited for the victim to approach. The appellant then pelted the victim with nine gunshots, two of which may have come from the victim's own gun. Obviously, the appellant premeditated the victim's death. The

appellant took part of the victim's vest and his handgun and tried to drive away in the victim's patrol car. When he could not get the car into gear, he drove the pickup truck back to Mike Chattin's house, where he expressed pleasure at having killed the victim and the desire to kill more police officers. He has shown no remorse, committed an unjustified and unprovoked premeditated murder, and exhibited a total disregard for human life.

At the time of the murder, the Caucasian appellant was thirty-one years old, and there is no indication the jury imposed the death sentence based upon his race or gender. The record reflects that he has prior convictions for assault, possession of drug paraphernalia, possession of a weapon, and resisting arrest. He has some brain damage; has suffered from post-traumatic stress disorder, depression, and paranoia; and has difficulty controlling impulses. However, he completed high school, and academic tests revealed his IQ was in the middle of the average range. The appellant is divorced with no children.

The death penalty has been upheld under facts similar to and under the application of the statutory aggravating circumstance found in the instant case. State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006) (defendant, a prison inmate, killed a prison counselor; death sentence upheld based upon (i)(2), (i)(5), (i)(8), and (i)(9); State v. Henderson, 24 S.W.3d 307 (Tenn. 2000) (defendant, a jail inmate, shot and killed a deputy transport officer, who had taken defendant to dentist's office for tooth extraction, during an escape; death sentence upheld based upon (i)(3), (i)(6), (i)(7), and (i)(9)); State v. Workman, 667 S.W.2d 44 (Tenn. 1984) (defendant shot and killed police officer after breaking free from officer, who had apprehended him for a restaurant robbery; death sentence upheld based upon (i)(3), (i)(6), (i)(7), and (i)(9); State v. Taylor, 771 S.W.2d 387 (Tenn. 1989) (defendant killed prison guard while attempting prison escape; death sentence upheld based upon (i)(2), (i)(5), (i)(8), and (i)(9)). The State has to show only one aggravating circumstance beyond a reasonable doubt in order for a jury to impose the death penalty. See State v. Moore, 614 S.W.2d 348, 351-52 (Tenn. 1981). Given that the appellant presented no mitigating evidence, the evidence was sufficient for the jury to find that the single aggravating factor in this case outweighed any mitigating circumstances. Having reviewed the circumstances of the case, we conclude that the death penalty imposed is not excessive or disproportionate to the penalty imposed in similar cases.

III. Conclusion

In accordance with the mandate of Tennessee Code Annotated section 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this case and conclude that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports the jury's finding of the statutory aggravating circumstances, and that the evidence supports the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt. See Tenn. Code Ann. § 39-13-206(c)(1)(A)-(C). A comparative proportionality review, considering both "the nature of the crime and the defendant," convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. See Tenn. Code Ann.§ 39-13-206(c)(1)(D). Moreover, we discern no errors that require a reversal in this case and affirm the sentence of death imposed by the jury.

However, we note that "when only one person has been murdered, a jury verdict of guilt on more than one count of an indictment charging different means of committing first degree murder will support only one judgment of conviction for first degree murder." State v. Cribbs, 967 S.W.2d 773, 788 (Tenn.1998). Nothing in the record indicates that the trial court merged the appellant's three first degree murder convictions. Thus, the case is remanded to the trial court in order for the court to enter one judgment reflecting the merger of the three counts.

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NORMA McGEE OGLE, JUDGE